Government Contract Principles

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GOVERNMENT CONTRACT PRINCIPLES
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FOREWORD

This contract manual is intended for use as a general introduction to Government contracts. The manual contains the general statutory and regulatory authorities affecting the award and performance of Government contracts, together with significant decisions rendered by the Comptroller General, the courts, and agency boards of contract appeals. The material in the manual is, of course, subject to revision by statute, regulation, or through the decision-making processes. Accordingly this manual should be considered as a general guide only and not as an all inclusive or definitive statement of the law regarding Government contracts.

This manual was first published in November 1970. A revised, updated edition was issued in August 1978. Among other things, the current edition contains new or expanded coverage of GAO's Bid Protest Procedures and related court actions; claims for bid and proposal preparation costs; and the Contract Disputes Act of 1978. However, revisions have generally been made only to the extent considered necessary to bring the manual up to date; organization and style changes have been held to a minimum.

We continue to believe that this manual serves a useful purpose, and we welcome any comments or suggestions for improvement from those who read and make use of this booklet.

Milton J. Socolar
General Counsel

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BASIC PRINCIPLES

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Contract

> "A contract is an agreement which creates an obligation. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation." 17 Corpus Juris Secundum, Contracts § 1(1)a.

The power of the United States to contract is incident to the general powers granted by the Constitution and upon entering a contract the Government becomes subject to the rule of Federal law as a private individual. United States v. Maurice, 26 Fed. Cas. 1211 (1823), United States v. Tingey, 30 U.S. (5 Pet.) 114 (1831), U.S. v. Allegheny County, 322 U.S. 174 (1944), and In Re American Boiler Works, 220 F.2d 319 (1955).

Contracting officer

> "Agency * * * in its broadest sense * * * includes every relation in which one person acts for or represents another by his authority." 2A Corpus Juris Secundum, Agency § 4a.

The contracting officer functions as the agent of the United States for the purposes of making contracts. See DAR § 1-201.3; FPR § 1-1.207. However, it is generally held that the contracting officer possesses only actual agency authority, and the Government is neither bound nor estopped by the acts of its officers in entering into, approving, or purporting to authorize agreements prohibited by law or otherwise beyond the scope of the officer's actual authority. See 22 Comp. Gen. 784 (1943), and the later discussion in this chapter on authority of agents to contract.

SECTION II--Appropriations and Government Contracts

Source of authority

Article I, Section 9, of the Constitution, which states that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," is a restriction upon the executive branch, and together with Article I,

Section 8, of the Constitution, means that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress. The Congress not only has the power to appropriate moneys from the Treasury but also has the concomitant power to regulate the manner in which these moneys are spent and accounted for. The General Accounting Office has prepared a separate detailed manual on appropriations law; what follows here is therefore summary in nature.

Appropriation statutes

The Congress has enacted numerous statutes applicable to appropriations generally and other specific provisions relating to certain types of appropriations and particular objects of expenditures. The following is not an exhaustive presentation of these statutes. The reader also is cautioned that specific yearly appropriation acts may dictate contrary results and should be carefully examined.

41 U.S.C. 11--"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment* * *." (Underscoring supplied.) This permits contracts to be entered into under a general authorizing statute passed by Congress or pursuant to a specific appropriation act. In the latter instance the contract liability expires when the appropriation is exhausted. Shipman v. United States, 18 Ct. Cl. 138 (1883), 37 Comp. Gen. 199 (1957).

41 U.S.C. 12--No contract for a public building or improvement shall exceed appropriation for that specific purpose. Further, an act of Congress merely authorizing an appropriation does not authorize expenditures or the making of contracts obligating money. 16 Comp. Gen. 1007 (1939). An appropriation available for the particular object must also have been enacted. 37 Comp. Gen. 732 (1958).

31 U.S.C. 627--No act of Congress shall be construed as an appropriation or authorization for entering into a contract involving the payment of money in excess of appropriations, unless so declared in specific terms. Additionally, appropriations, generally, must be used solely for objects made. 31 U.S.C. 628; 36 Comp. Gen. 386 (1956).

31 U.S.C. 665(a)--Expenditures or contract obligations in excess of available appropriations are prohibited. This act is popularly known as the Antideficiency Act and contains several other provisions. This act does not prohibit a conditional contract where Government's liability is contingent on future availability of appropriations. 39 Comp. Gen. 340 (1959).

31 U.S.C. 712a--Appropriations for a specific fiscal year shall be applied only to payment of expenses incurred during that year or to the fulfillment of contracts properly made within that year.

41 U.S.C. 13--Contracts for supplies generally limited for term of 1 year.

31 U.S.C. 682--Appropriations for construction of public buildings are available until completion of the work.

Obligation of appropriations

Generally, it may be stated that the obligation of an appropriation occurs when a definite commitment is made or a legal liability is incurred to pay funds from the appropriation. See 31 U.S.C. 200; 37 Comp. Gen. 861 (1958). Similarly, an option reserved by the Government in a contract to order additional quantities does not obligate appropriations until exercised. 19 Comp. Gen. 980 (1940).

Availability of appropriations

The term "availability" as applied to appropriations may refer either to the purpose for which appropriations are made or to the time period within which they may be obligated.

Respecting availability of purpose, Federal agencies may make use of funds only for purpose appropriated. 31 U.S.C. 628. Nor may an agency expand the availability of its own appropriations without legislative sanction or transfer a liability incurred to the appropriations of another agency. 43 Comp. Gen. 687 (1964). However, expenses incident to the specific purpose of an appropriation are allowable. 29 Comp. Gen. 419 (1950); 38 id. 782 (1959).

In situations where two appropriations are available for a particular expenditure, a specific appropriation precludes the use of a general appropriation, even after exhaustion of

the specific appropriation. 1 Comp. Gen. 312 (1921); 20 id. 739 (1941); 34 id. 236 (1954); 38 id. 758 (1959). However, where two appropriations reasonably may be construed as equally available, the administrative determination of the appropriation to be used will not be questioned by accounting officers. The selected appropriation must thereafter continue to be used to exclusion of another in the absence of changes in the appropriation acts. 23 Comp. Gen. 827 (1944).

In terms of availability of time, appropriations statutes normally specify their period of availability. When an appropriation is by its terms made available until a specified date, the general rule is that availability relates to the authority to obligate the appropriation and does not necessarily prohibit payments after the period of availability pursuant to obligations previously incurred, unless the payment is otherwise expressly prohibited by statute. 16 Comp. Gen. 205 (1936); 23 id. 862 (1944); 37 id. 861 (1958). The general rule relative to obligating fiscal-year appropriations by contracts is that the contract must be made within that fiscal year and the subject matter must concern a bona fide need arising within that fiscal year. 42 Comp. Gen. 81 (1962); id. 272 (1962); 44 id. 399 (1965).

Disposition of appropriated funds

Generally, appropriations not obligated within the period available lapse, i.e., they are no longer available for incurring new obligations. A related problem involves the disposition of appropriations recovered after the availability period. Where the availability period has expired and an award is determined to be invalid, no binding agreement ever existed and the funds cannot be regarded as having been obligated and are no longer available for obligation for subsequent awards. 38 Comp. Gen. 190 (1958). When a contract is terminated, either for default or convenience (see chapter 6, section III), the funds remain available for the execution of a replacement contract within a reasonable time. 2 Comp. Gen. 130 (1922); 34 id. 239 (1954); 44 id. 623 (1965).

Damages recovered for breach of contract from a defaulting contractor for losses or damages under its contract should not be credited to the appropriation under which the contract payments were made, but should be deposited into the Department of the Treasury as miscellaneous receipts.

10 Comp. Gen. 510 (1931); 44 id. 623 (1965). However, liquidated damages recovered or deducted from amounts due a contractor, are credited to the appropriation and are available if the liquidated damages are later remitted. 44 Comp. Gen. 623 (1965).

SECTION III--Agency in Government Contracts

General

The President of the United States, the Nation's Chief Executive under the Constitution, is responsible for the procurement of the Government's needs. However, because Congress appropriates the requisite funds and establishes criteria for their expenditure, Government procurement is really a joint undertaking. After World War II Congress standardized the procurement process by enactment of the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949. Those statutes granted the basic contracting authority to the heads of the appropriate agencies. By its very nature this function was required to be delegated to agents, the contracting officers. A fundamental concept with regard to the source and scope of the authority possessed by Government officers and agents was set forth by the United States Supreme Court in The Floyd Acceptances, 74 U.S. 666 (1868):

> "When this inquiry arises, where are we to look for the authority of the officer?
>
> "The answer, which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law." (Underscoring supplied.)

As previously noted in section I, the United States as an incident of its sovereignty has the power to enter into contracts. However, the agents of the Government have only such power as is conferred on them by law and it is well settled that they may make only such contracts as they are authorized by law to make. Whiteside v. United States, 93 U.S. 247 (1876). In Franklin Rives v. United States, 28 Ct. Cl. 249 (1893), it was held that although a public officer could not bind the Government by contract unless he was authorized to so by law, this authority could nevertheless be implied from a statute. Equally, where public officers are authorized to enter into contracts, they may bind the Government to implied as well as express contracts. Fries v. United States, 170 F.2d 726 (1948).

Authority to contract

Generally the law of agency is applicable in the same manner to the United States as it is to private individuals. The important exception to this general statement, however, is the law dealing with apparent authority. Private individuals, as principals, are bound to the extent of the power they have apparently given their agents, while the United States is bound only to the extent of the power it has actually given its agents; unauthorized acts of such agents does not obligate the Government. 16 Comp. Gen. 325 (1936); Filor v. United States, 76 U.S. 45 (1869). Therefore, agents of the United States possess only actual authority, which includes both express and implied powers. For cases involving implied powers of agents to commit the Government contractually, see Centre Manufacturing Co. v. United States, 183 Ct. Cl. 115, 392 F.2d 229 (1968), and United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875). Further, while the scope of a contracting officer's authority is commonly limited by the statute conferring the authority, it is not unusual to find that the authority delegated may be limited also by regulations promulgated pursuant to statutes. These regulatory restrictions on the agent's authority, when published in the Federal Register, are binding in transactions even though the other party did not have actual knowledge of the regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

Duty to ascertain extent of agent's authority

"He who deals with an agent of the government must look to his authority, which will not be presumed but must be established. He cannot rely upon the scope of dealing or apparent authority as in the case of a private agent." United States v. Willis, 164 F.2d 453, 455 (1947). The doctrine of reliance upon apparent authority after reasonable investigation is not applicable to Government agents where the actual authority is prescribed by statute or regulation. Federal Crop Insurance Corp. v. Merrill, supra. However, when dealing with employees or agents of bidders or contractors, the United States may rely upon the apparent authority as well as actual authority. American Anchor and Chain Corp. v. United States, 166 Ct. Cl. 1, 331 F.2d 860 (1964). The trend of the more recent cases seems to be to prevent the Government from repudiating, on the basis of technical lack of specific authority, the arguably authorized acts of its agents. This has been accomplished by close analysis of the nature of the agent's actual authority together with discussion and application of concepts of implied delegation of authority, estoppel, and ratification. See Branch Banking and Trust Co. v. United States, 120 Ct. Cl. 72, 98 F. Supp. 757 (1951); Fox Valley Engineering, Inc. v. United States, 151 Ct. Cl. 228 (1960); Williams v. United States, 130 Ct. Cl. 435, 127 F. Supp. 617 (1955); Emeco Industries, Inc. v. United States, 202 Ct. Cl. 1006, 485 F.2d 652 (1973); 53 Comp. Gen. 502 (1974).

Sovereign acts

In addition to the acts of Government agents which either result in formation of a contract, alter the parties' rights under an existing contract or represent a breach of contract (see chapters 2 and 6), the Government sometimes performs functions and acts in other capacities which affect Government contracts. These acts, performed in a sovereign rather than contractual capacity, do not present a basis for recovery of damages based upon a contract, notwithstanding that the act may have caused the contractor severe financial injury. The basis for this rule of law is twofold: first, that the Government cannot contract away its sovereignty or duty to take acts in the interest of the public, and second, that the contractor should not be in a better position because his contract is with the Govern ment rather than a private party. Horowitz v. United States 267 U.S. 458 (1925). The courts have usually found the acts of Government agents to be made in a sovereign capacity

where they: (1) are public and general, not directed to the contractor; (2) would equally affect dealings of private parties; (3) are in the public interest; and (4) have an indirect rather than direct affect on the contract. The doctrine of sovereign capacity is used as a defense by the Government to a monetary claim by a contractor. However, the Government by appropriate language in the contract may make delays caused by its sovereign acts a basis for equitable adjustment; furthermore, the acts of the Government, whether "contractual" or "sovereign," will under the standard excusable delays clauses provide protection against contractor liability for nonperformance.

SECTION IV--Selected Statutes Relating to Procurement

Among the principal statutes respecting Government procurement are:

Advertising for Government Contracts
41 U.S.C. 5

Aircraft Design Competition
10 U.S.C. 2271-2279

Antideficiency Act
31 U.S.C. 665

Anti-Kickback Acts
18 U.S.C. 874, 41 U.S.C. 51-54

Architect and Engineer Selections
40 U.S.C. 541-544

Armed Services Procurement Act
10 U.S.C. 2301 et seq.

Automatic Data Processing Equipment
40 U.S.C. 759

Attendance at Bid Opening
41 U.S.C. 8

Assignment of Claims and Contracts
31 U.S.C. 203
41 U.S.C. 15

Blind Made Supplies
41 U.S.C. 46-48

Budget and Accounting Act of 1921
31 U.S.C. 1 et seq.

Buy American Act
41 U.S.C. 10(a)-(d)

Commission on Government Procurement
P.L. 91-129, November 26, 1969, 83 Stat. 269

Contract Disputes Act of 1978
41 U.S.C. 601-613

Contract Work Hours and Safety Standards Act (Work Hours Act of 1962), 40 U.S.C. 327-332

Contract or Political Contributions
18 U.S.C. 611

Contracts for Acquisition of Naval Vessels or Aircraft
50 U.S.C. App. 1152

Contracts in Advance of or in Excess of Available Appropriations, 31 U.S.C. 665(a)
18 U.S.C. 435

Court of Claims Jurisdiction, generally
28 U.S.C. 1492, 1494, 1499, 1503, 2508, 2509, 2510

Davis-Bacon Act, as amended
40 U.S.C. 276a

Defense Production Act of 1950
50 U.S.C. App. 2061-2168

Destruction of Defense Contract Records
18 U.S.C. 443

Economy Act; Furnishing of Goods and Services on an Interagency Basis, 31 U.S.C. 686

Employment of Former Government Officials by Government Contractors, 50 U.S.C. 1436
42 U.S.C. 2462
37 U.S.C. 801

Extraordinary Contractual Acts to Facilitate the National Defense (P.L. 85-804)
50 U.S.C. 1431-1435

False Claims
31 U.S.C. 231-235
18 U.S.C. 287, 494, 495, 1001
28 U.S.C. 2514

Federal Grant and Cooperative Agreement Act of 1977
41 U.S.C. 501-509

Federal Property and Administrative Service Act of 1949, As Amended
40 U.S.C. 471 et seq.
41 U.S.C. 251-260

Foreign Assistance Act of 1961, As Amended
22 U.S.C. 2151 et seq., especially 2352, 2354, 2356, 2361, 2365

Inspection and Audit of War Contractors (Second War Powers Act, 1942) 50 U.S.C. App. 643

Interest on Claims
28 U.S.C. 2516

Members of Congress; Interest in Contracts; Contracts With
41 U.S.C. 22
18 U.S.C. 431-433

Merchant Marine Act, 1936
46 U.S.C. 1155, 1155a

Meritorious Claims Against United States Not Subject to Lawful Adjustment, Submission to Congress
31 U.S.C. 236

Miller Act, As Amended
40 U.S.C. 270a-f

Office of Federal Procurement Policy Act
41 U.S.C. 401-412

Patents, Use by Contractor under Government Contract
28 U.S.C. 1498

Proprietary Information
18 U.S.C. 1905

Renegotiation Act of 1951, As Amended
50 U.S.C. App. 1211-1233

Service Contract Act of 1965, As Amended
41 U.S.C. 351-358

Small Business Act, As Amended
15 U.S.C. 631-647

Statute of Limitations on Actions on Claims By and Against the United States
28 U.S.C. 2401, 2415, 2501

Strategic and Critical Materials Stock Piling Act
50 U.S.C. 98-98h

Tucker Act
28 U.S.C. 1346, 1491

Vinson-Trammel Act
10 U.S.C. 2382, 7300

Walsh-Healey Act
41 U.S.C. 35-45

Wunderlich Act
41 U.S.C. 321, 322

In addition to the several other statutes affecting Government contracts, there are agency procurement regulations, directives, procedures and instructions. Principal among these are the Federal Procurement Regulations (FPR); the Defense Acquisition Regulation (DAR) (called the Armed Services Procurement Regulation prior to 1978); and the National Aeronautics and Space Agency Procurement Regulations (NASAPR).

CHAPTER 2

FORMATION OF CONTRACTS

SECTION I--General

All contracts require the essential elements of offer and acceptance. These elements constitute the means by which a contract is consummated, and the absence of either element prevents the formation of a contract. In Government procurements, the invitation for bids (IFB), request for quotations or proposals constitutes a request by the Government for offers of a certain nature. The bid or proposal submitted in response to the solicitation is in fact the offer and the subsequent contract award constitutes acceptance. In addition to the statutory requirements and the many legal complexities attached to the various methods of Government procurement (see chapters 3 and 4), several principles applicable to Government contracts respecting offer and acceptance are evolved from common law.

SECTION II--Offers

> "An offer is a signification by one person to another of his willingness to enter into a contract with him on the terms specified in the offer, a statement by the offeror of what he will give in return for some promise or act of the offeree. ***It must be more than a mere expression of desire or hope. ***A mere statement of willingness to enter into negotiations *** is not an offer." 17 Corpus Juris Secundum, Contracts §35.

Elements

An offer may be conveyed in any manner, written, oral, telegraphic, etc.; however, it is fundamental that the proposal must, in fact, be communicated to the person or persons intended to constitute an offer. Kleinhaus v. Jones, 68 F. 742 (1895). The manner for communicating offers is usually specified in the solicitation in Government procurements. The character of the offer may be one of four: a promise by the offeror for assent by the offeree; an act by the offeror for a promise by the offeree; the exact reverse, or a promise for a promise. The latter is the most common in Government contracts where the contractor promises to perform in a certain manner in return for the Government's promise to make payment of a certain amount.

Types

Generally an offer may concern a contract for any subject matter not contrary to public policy. Some offers, such as an offer to join an offeree in the commission of a criminal or other prohibited act, cannot be given legal sanction and are not capable, at least for contract creation purposes, of being legally and effectively accepted. Equally important as communication of an offer is the requirement that the offer communicated be clear and definite.

> "*** it is essential to a contract that the nature and the extent of its obligations be certain. * * * If an agreement is uncertain it is because the offer was uncertain or ambiguous to begin with, since the acceptance is always required to be identical with the offer, or there is no meeting of minds and no agreement." 17 Corpus Juris Secundum, Contracts § 36(2)a. (Underscoring supplied.)

Revocation of offers

> "An offer cannot be revoked after its acceptance without the acceptor's consent; but it may be revoked at any time before acceptance, even though it allows a specified time for acceptance, unless it is under seal or supported by a consideration." 17 Corpus Juris Secundum, Contracts §50.

While under ordinary principles an offeror may withdraw or modify his offer at any time prior to acceptance, a distinction has been drawn when an offer in the form of a bid is made to the Government in a formally advertised procurement. In that situation, where there is no mistake, or unreasonable delay, the bid may be withdrawn or modified as a matter of right only until the date and hour set for opening of bids. Subsequent to bid opening, the Government has the power to award a contract, on the basis of the bid submitted, for a specified period of time. Refining Associates, Inc. v. United States, 124 Ct. Cl. 115 (1953). This is known as the "firm bid" rule. In a negotiated Government procurement, in contrast, an offeror can generally withdraw its proposal at any time prior to award. United Electric Motor Company, Inc. B-191996, September 18, 1978, 78-2 CPD 206.

SECTION III--Acceptance

> "*** before an offer can become a binding promise and result in a contract it must be accepted." 17 Corpus Juris Secundum, Contracts §39.

"*** an acceptance *** must be identical with the offer and unconditional." 17 Corpus Juris Secundum, Contracts § 43.

It is a fundamental rule in the law of contracts that since an offeror has complete freedom to make no offer at all, he is at liberty to dictate whatever terms he sees fit if he chooses to make an offer. Thus, the offeror may dictate the mode by which his offer is to be accepted, the time within which it is to be accepted, and the person by whom it is to be accepted. In Government contracts, however, this freedom is limited by the necessity in formally advertised procurements that the bid "conform" to the terms of the invitation in order to be accepted. See chapter 3, section V.

In addition, the law imposes other important limitations on the process of contract formation. For example, it has been said that an offer and acceptance must have the characteristics of a bargain and the knowledge by either party that the other does not intend what his words or acts ostensibly express will prevent such words or acts from operating as an offer or acceptance.

Party for acceptance

"Only the particular person to whom an offer is made can accept it; but a general offer to the public, or to a particular class of persons, may be accepted by anyone, or by anyone of the class described." 17 Corpus Juris Secundum, Contracts §40.

Most often in practice an offer is directed and communicated to a particular party for his acceptance only. The offer of a reward is the best example of an offer to the public for acceptance by anyone complying with the terms of the offer.

Time for acceptance

If an offer does not specify a time limit within which acceptance must be made, the law provides that acceptance must be made within a reasonable time. This rule of law was fully set out in 26 Comp. Gen. 365 (1946), at page 367:

"It is well settled that when the offer does not specify the time within which it may be accepted, it must be accepted within a reasonable time and that what is reasonable time is determined by consideration of all circumstances * * *"

However, what constitutes a reasonable time for acceptance of an offer is measured from the time the offer is received by the offeree and not from the time the offer is dated or mailed. Caldwell v. Cline, 156 S.E. 55 (1930). This is based upon the rule that an offer takes effect only when it is communicated to the offeree. Kleinhaus v. Jones, supra. Of particular importance to Government contracts is the result that if acceptance is not effected within the time specified, the Government has no power to award a contract without the acquiescence of the bidder. 46 Comp. Gen. 371 (1966). While award may be made under such circumstances, the Government faces the peril of losing the benefits of competition by failing to accept in a timely manner.

Mode of acceptance

> "Except where a particular mode of acceptance is prescribed by the offer *** an acceptance need not be express or formal, but may be shown by words, conduct, or acquiescence indicating agreement to the proposal or offer." 17 Corpus Juris Secundum, Contracts § 41.

Normally, the manner for acceptance of offers by Government contracting officers is specified by the invitation for bids or request for proposals. However, actions by agents of the Government have been held sufficient to imply acceptance of an offer not formally accepted. Thomson v. United States, 174 Ct. Cl. 780 (1966). Also of importance in public contracting where acceptance is unually made by mailing notice of award or the formal contract documents, is the rule that acceptance where authorized or contemplated by parties to be made by mail takes effect at the time the letter containing the acceptance is mailed not when it is received by the offeror. William H. Tayloe v. The Merchants' Fire Insurance Company of Baltimore, 50 U.S. 390 (1850). Furthermore, it is immaterial on the question of effective acceptance that a mailed acceptance never reaches its destination as the contract being complete at the point in time when the letter is mailed. Barnebey v. Barron C. Collier, Inc., 65 F.2d 864 (1933); 45 Comp. Gen. 700 (1966).

Language of Acceptance

Courts are hesitant to "interpret" parties into a contract when acceptance is not absolute and unqualified. Phoenix Iron & Steel Co. v. Wilkoff Co., 253 F. 165 (1918).

The rationale for this reluctance is expressed clearly in United States v. Braunstein, 75 F. Supp. 137 (1947), at page 139:

> "It is true that there is much room for interpretation once the parties are inside the framework of a contract, but it seems that there is less in the field of offer and acceptance. Greater precision of expression may be required, and less help from the court given, when the parties are merely at the threshold of a contract." (Underscoring supplied.)

However, when the acceptance is positive, unambiguous, and does not change, add to, or qualify the terms of the offer, a binding contract is created despite any obscurity in the terms of acceptance. 35 Comp. Gen. 272 (1955).

One outgrowth of the rule which states that an acceptance must be identical with the terms of the offer is that a conditional or qualified acceptance constitutes a counteroffer, which rejects the original offer. If under these circumstances the original offeror responds in a manner satisfying the acceptance principles, then a contract is formed on the basis of the counteroffer.

Acceptance Subject to Approval of Third Party

A not uncommon problem, especially in Government contracts, is the one presented in those situations where an acceptance is conditioned upon the consent of a third party or higher authority. Where an agreement is made subject to the consent of a third party, it must be looked on as a conditional agreement which is dependent upon such consent being given; prior to such consent the agreement must be taken not to have become effective. 17 Corpus Juris Secundum, Contracts § 43. Although an acceptance calling for the approval of a third party must be approved by that third party before the contract is valid, it has also been held that, unless otherwise specifically provided in the acceptance, such approval need not be in writing and may be implied, indirect and informal. Purcell Envelope Co. v. United States, 51 Ct. Cl. 211 (1916).

Formal contract execution

It is well established that, generally, the acceptance contractor's offer by an authorized agent of the Govern- results in the formation of a valid and binding contract

between the parties, even though the parties contemplate or the statutes require, that a formal written contract is to be thereafter executed by the parties, and irrespective of whether such formal contract is thereafter executed. Garfield v. United States, 93 U.S. 242 (1876); United States v. Purcell Envelope Co., 249 U.S. 313 (1919); United States v. New York and Porto Rico Steamship Co., 239 U.S. 88 (1915); 23 Comp. Gen. 596 (1944). Acceptance of the contractor's offer must be clear and unconditional, however, and it must also appear that both paries intend to make a binding agreement at the time of the acceptance.

SECTION IV--Consideration

Inasmuch as gratuitous promises generally are not enforceable, the existence of a valuable consideration on the part of both the offeror and offeree is an essential element of a contract. Where there is lack of consideration and mutuality, there is no contract. The requirement of consideration is equally applicable to supplemental agreements or contract amendments. The general rule is that in the absence of a statute specifically so providing no agent or officer of Government has the power to give away or surrender a vested contractual right of the Government. 22 Comp. Gen. 260 (1942); cf., 41 id. 134 (1961).

Existence of consideration

Normally Government contracts entail numerous promises and obligations by each party. However, consideration to support the agreement may also be furnished by the waiver or forbearance to exercise a legal right. 41 Comp. Gen. 730 (1962). In this regard, the parties to a Government contract may by mutual agreement release each other from executory obligations. Savage Arms Co. v. United States, 266 U.S. 217 (1924).

Usually a Govenment contract is not divisible into exchanges of individual promises. Therefore, the whole benefit or obligation of one party is the consideration for the benefit or obligation of the other party. Moreover, a single obligation or benefit can be consideration for more than one promise. Pennsylvania Exchange Bank v. United States, 145 Ct. Cl. 216 (1959). However, separate consideration is required when the promises or agreements are severable. 47 Comp. Gen. 170 (1967).

Adequacy of consideration

Generally, the adequacy of the consideration will not be questioned, provided it exists and the contract is not a grossly unconscionable agreement. Hume v. United States, 132 U.S. 406 (1889). 47 Comp. Gen. 170 (1967).

The requirement of consideration does not apply to extraordinary relief granted under Public Law 85-804, 50 U.S.C. 1431. The Comptroller General also has ruled that new consideration is unnecessary to renew a debt barred by the statute of limitations. B-162293, September 29, 1967.

SECTION V--Mistakes

> "Ordinarily a unilateral mistake affords no ground for avoiding a contract, although it may do so where it results in a complete difference in subject matter so as to preclude existence of consideration, or where it is caused by, or known to, the other party." 17 Corpus Juris Secundum, Contracts § 143.

The mistake must be one of existing fact, not law. Where the mistake is mutual, a valid contract does not result, and the bidder will be allowed to withdraw or correct his bid or the existing agreement will be reformed to reflect the true intent of the parties. In the context of Government contracts, the mistake is that of the bidder and is typically discovered after bid opening when the bid no longer may be changed or withdrawn at will. While the mistake rules apply equally to negotiated and advertised procurements, primary concern is with the latter due to the greater flexibility in negotiation which permits changing of offers to correct errors.

Mistakes discovered before award

> "It is settled law that a bidder under an advertised Federal invitation for bids may not modify or withdraw its bid after bids have been opened. Refining Associates, Inc. v. United States, 109 F. Supp. 259, 124 Ct. Cl. 115. It has been held, however, that where the public body, as here, is on notice of error in a bid which has been submitted, acceptance of that erroneous bid will not result in the formation of an enforceable contract. Moffett, Hodgkins & Clarke Co. v. Rochester,

178 U.S. 373. For this reason, it has been a long-standing practice in Federal procurement to permit withdrawal of a bid upon convincing proof of error therein. And in appropriate cases, where there is clear and convincing evidence of the intended correct bid, and where that intended bid is still the lowest bid, we have sanctioned acceptance of the corrected bid." 42 Comp. Gen. 723, 724 (1963).

Although originally the Comptroller General sought to exercise alone the authority to permit withdrawal or correction of bids, 11 Comp. Gen. 65 (1931), this authority has since been exercised jointly with the procurement agencies. 38 Comp. Gen. 177 (1958).

When a mistake has been alleged prior to award, the bid may be withdrawn if the bidder presents evidence to reasonably support the allegation of error. However, for correction of a bid a higher burden of proof is placed upon the bidder and the mistake must not relate to the responsiveness of the bid. 38 Comp. Gen. 819 (1959). See also section V, chapter 3, Formal Advertising. A bid will be corrected only if clear and convincing evidence is presented (1) that a mistake was made, (2) as to the nature of the mistake, (3) how it was made, and (4) what the bid would have been except for the mistake. Further, if bid correction will displace a lower bidder, this evidence must be found in the invitation and bid documents, not by the aid of extrinsic evidence supplied by the bidder. 37 Comp. Gen. 210 (1957); 41 id. 469 (1962); 42 id. 257 (1962). However, the weight to be given evidence submitted in support of a requested correction of a bid is primarily a question of fact for resolution by the agency granting correction. 41 Comp. Gen. 160 (1961). The Comptroller General will not question an agency's denial of correction of an alleged bid mistake unless the agency's action is without a reasonable basis. Ace-Federal Reporters, Inc., 54 Comp. Gen. 340 (1974), 74-2 CPD 239.

Mistakes discovered after award

Generally, the contract as awarded represents the final understanding of the parties and determines all rights and liabilities thereunder. The right of the Government to receive performance in strict accordance with the contract terms may not be waived in the absence of adequate consideration even though equities, such as mistake, exist in favor of the contractor. However, where a mistake is so

apparent that the contracting officer must be presumed to have had knowledge of it, or where it can be shown that in fact he did have knowledge of it, the Government through its agents cannot take advantage of the contractor by holding it to a contract which it had no intention of making. 37 id. 685 (1958); 45 Comp. Gen. 305 (1965). The mistake must be a patent error as the contracting officer does not have a duty to assure himself that a low bid, regular on its face, was computed correctly with due regard to economic conditions, past procurements, or other matters purely incidental to the written bid. 39 Comp. Gen. 405 (1959). Additionally, the contractor may waive his right to relief by verifying the bid prior to award, executing the contract with knowledge of the mistake, or by fully performing the contract before seeking relief.

SECTION VI--Protests and Court Actions

Protests to contracting agencies

Protests concerning the award of Federal contracts may be filed directly with the contracting agencies. DAR § 2-407.8; FPR § 1-2.407-8.

Protests to GAO

Since 1925 GAO has entertained, on the basis of its authority to settle all accounts in which the United States is concerned (31 U.S.C. 71) and to make settlements of the accounts of accountable officers of the Government (31 U.S.C. 74), bid protests which allege violation of the statutory and regulatory provisions which govern the formation of Government contracts. The number of protests filed with GAO has gradually increased over the years, and since the early 1970's has averaged more than 1,000 per year.

GAO considers protests pursuant to its Bid Protest Procedures 4 C.F.R. part 20. Some of the more important provisions of the Procedures are briefly described below.

Interested party

Protests may be filed by parties which are "interested" (4 C.F.R. § 20.1(a)). Whether a party is sufficiently interested to have its protest considered by GAO depends on the facts and circumstances of the particular case. GAO will examine such factors as the protester's status in relation to the procurement, the nature of the issues raised, and the type of relief sought. Some illustrative decisions are American Satellite Corporation (Reconsideration),

B-189551, April 17, 1978, 78-1 CPD 289, and Die Mesh Corporation, 58 Comp. Gen. 111 (1978), 78-2 CPD 374.

Timeliness

While there are some fine distinctions in this area, the basic rules can be expressed in three general propositions: protests based upon apparent improprieties in solicitations must be filed prior to bid opening or the closing date for receipt of proposals (4 C.F.R. § 20.2(b)(1)); protests on all other grounds must be filed within 10 working days after the protester knows or should know its basis for protest, whichever is earlier (4 C.F.R. §20.2(b)(2)); and if a protest is filed initially with the contracting agency, any subsequent protest to GAO must be filed within 10 working days after the protester is notified or should know of "initial adverse agency action" (4 C.F.R. § 20.2(a)).

For the most part, the timeliness requirements have been enforced rather strictly. There are a number of cases where protests filed only a matter of minutes late were dismissed, e.g., Memorex Corporation, B-195945, October 1, 1979, 79-2 CPD 235. The Bid Protest Procedures provide (4 C.F.R. § 20.2(c)) for exceptions to the timeliness requirements "for good cause shown" (which no case has yet found) and where GAO determines a protest raises "significant issues" (which have been found in several dozen cases). A significant issue has been variously described as one which involves a procurement principle of widespread interest (52 Comp. Gen. 20 (1972)) and as one which affects a broad range of procurements by an agency (Singer Company, 56 Comp. Gen. 172 (1976), 76-2 CPD 381). GAO has said in a number of decisions that the significant issue exception must be applied sparingly. It is unlikely that an issue will be found "significant" if similar issues have been considered in prior GAO decisions.

Other provisions

Among other things, the Procedures provide for the submission of agency reports on protests (4 C.F.R. § 20.3(a),(c)) and an opportunity for protesters and other interested parties to submit written comments on such reports (4 C.F.R. § 20.3(d)). They also provide for the disclosure to interested parties of information submitted by protesters except to the extent that withholding is permitted or required by law or regulation (4 C.F.R. § 20.3(b), § 20.5). A protester, the agency or other interested parties may request a conference (an informal meeting) with

GAO representatives concerning a protest (4 C.F.R. § 20.7). Finally, GAO's goal is to issue a decision within 25 working days after the record in a case closes (4 C.F.R §20.8), and any request for reconsideration of GAO's decision must be filed within 10 working days after the basis for the request is known or should have been known, whichever is earlier (4 C.F.R. § 20.9).

The foregoing is intended only as a summary of the highlights of the Bid Protest Procedures. Additional detail is available in a booklet prepared by GAO's Office of General Counsel, "BID PROTESTS AT GAO, A Descriptive Guide".

Limitations on GAO review of protests

Even where an interested party has filed a timely protest concerning an award by an agency whose accounts are subject to settlement by GAO, there are a number of situations in which GAO either will not review certain issues or will review them only to a limited extent. Some examples are:

Contract administration matters

In general, GAO will not consider protests which essentially raise issues of contract administration. Some illustrative decisions are Albert S. Freedman d/b/a Reliable Security Services, B-194016, February 16, 1979, 79-1 CPD 122 (protest alleging that a contractor is not performing in accordance with the contract specifications); Mark A. Carroll and Son, Inc., B-194705, May 11, 1979, 79-1 CPD 340 (protest filed by contractor seeking GAO review of agency's decision to terminate its contract for default); and Optimum Systems, Inc., B-194984, B-195424, December 7, 1979, 79-2 CPD 396 (protest essentially based on the interpretation of provisions of a prior contract, which issues were concurrently the subject of a disputes proceeding). On the other hand, GAO has on a number of occasions considered protests alleging that modifications to contracts changed the contracts so substantially that the work covered by the modifications should have been obtained by new procurements. See, e.g., American Air Filter Company, Inc., 57 Comp. Gen. 258 (1978), 78-1 CPD 136, also 57 Comp. Gen. 567 (1978), 78-1 CPD 443. Further, where an agency terminates a contract for the convenience of the Government because it believes the award of that contract was improper, and the contractor protests to GAO, GAO will review the propriety of the award. Safemasters Company, Inc., 58 Comp. Gen. 225 (1979), 79-1 CPD 38.

Affirmative determinations of responsibility

GAO does consider protests concerning determinations of nonresponsibility. However, since 1974 (Central Metal Products, 54 Comp. Gen. 66 (1974), 74-2 CPD 64) GAO as a general rule has declined to consider protests regarding affirmative determinations of responsibility, unless there is a showing of fraud or it is alleged that definitive responsibility criteria set forth in the solicitation were not properly applied by the agency. See e.g., ENSEC Service Corporation, 55 Comp. Gen. 494 (1975), 75-2 CPD 341; Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294.

Grants and procurements under grants

In a Public Notice appearing in 40 Fed. Reg. 42406, September 12, 1975, GAO announced that it would, in certain circumstances, consider complaints by prospective contractors regarding the awarding of contracts under Federal grants. Since that time, GAO has considered several dozen such complaints or "requests for review" per year. The Bid Protest Procedures are not applicable to these complaints. Johnson Controls, Inc., B-188488, August 3, 1977, 77-2 CPD 75. Also, GAO generally will not consider protests concerning the awarding of grants, except where it is alleged that the agency was required to satisfy its needs by awarding a procurement contract rather than a grant. Bloomsbury West, Inc., B-194229, September 20, 1979, 79-2 CPD 205.

Small business size status

GAO will not consider such protests because under 15 U.S.C. § 637(b)(6) (1976), as amended by section 501 of Public Law 95-89, August 4, 1977, SBA is conclusively empowered to determine small business size status for Federal procurement and sales purposes. See e.g., United States Certification Bureau, Inc., B-192564, August 18, 1978, 78-2 CPD 136.

Subcontract protests

In general, GAO will not consider protests concerning awards of subcontracts unless the prime contractor is acting as the Government's purchasing agent; the Government's active or direct participation in the selection of the subcontract has the net effect of causing or controlling potential subcontractors' rejection or selection, or of significantly limiting subcontractor sources; fraud or bad faith in the Government's approval of the subcontract award is shown; the subcontract is made "for" the Government; or

the agency requests an advance decision. Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

The above listing of areas of limited GAO review is not all-inclusive and is, of course, subject to change either by decision or revisions to the Bid Protest Procedures.

Foreign military sales

At one time GAO declined to consider protests involving procurements for foreign military sales on the basis that payments from appropriated funds were not involved. However, in Procurements Involving Foreign Military Sales, 58 Comp. Gen. 81 (1978), 78-2 CPD 349 GAO overruled or modified a number of prior decisions and held that it would undertake bid protest-type reviews concerning the propriety of contract awards under the FMS program, because appropriated funds are utilized in such procurements and significant dollar amounts are involved.

Court actions

For many years it was generally considered that prospective contractors had no standing to sue the Government since the procurement laws and regulations were for the benefit of the Government and not for the benefit of private parties seeking contracts. The case generally cited for this rule wa Perkins v. Lukens Steel Co., 310 U.S. 113 (1939).

In 1970, the decision of the U.S. Court of Appeals for the District of Columbia in Scanwell Laboratories, Inc. v. Schaffer, 424 F. 2d 859 (1970), granted a bidder standing to sue the Government on the basis that the enactment of the Administrative Procedure Act (specifically section 10) subsequent to the Perkins decision constituted a legislative reversal of that decision. The Scanwell holding has been adopted in the majority of Federal circuits. See e.g., Armstrong & Armstrong, Inc. v. United States, 514 F.2d 402, (9th Cir., 1975), and cases cited therein; Airco, Inc. v. Energy Research and Development Administration, 528 F.2d 1294 (7th Cir., 1975); and Merriam v. Kunzig, 476 F.2d 1233 (3d Cir., 1973).

The Scanwell case held that a bidder was not required first to present his case to GAO before heing entitled to seek judicial review of the questioned procurement action; the court merely stated that GAO review might constitute a useful alternative procedure under certain circumstances. In Wheelabrator Corporation v. Chafee, 455 F.2d 1306 (1971), the D.C. Circuit Court of Appeals discussed at some length the relationship between the judicial remedy and the protest procedure available at GAO and suggested that a court's use

of a preliminary injunction pending a GAO decision on a protest would be "a felicitous blending of remedies and mutual reinforcement of forums." The Court, in the companion case of M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (1971), criticized the District Court for failure to consider the opinions of GAO prior to its disposition of the case; in the view of the Court of Appeals, the GAO decision would have provided the District Court with valuable guidance.

One important trend since Wheelabrator and Steinthal has been that protester/plaintiffs often attempt to secure preliminary injunctions in order to "freeze" the status quo and provide GAO with an opportunity to render decisions on their protests, which the courts can then take into consideration in the disposition of the suits. For example, GAO issued its opinion 52 Comp. Gen. 161 (1972), in connection with the judicial proceedings involved in Serv-Air, Incorporated v. Seamans, 473 F.2d 158 (1972); in the Merriam case, the District Court stayed proceedings in order to receive the GAO opinion on Merriam's protest. Also, courts have often relied heavily on the body of precedent developed over the years by GAO. See Airco, supra; also Kinnett Dairies, Inc. v. Farrow, 580 F.2d 1260 (5th Cir., 1978); and Sea-Land Service, Inc. v. Brown, 600 F.2d 429 (3d Cir., 1979).

It must be noted in this connection that where the subject matter of a protest pending at GAO is also involved in litigation before a court of competent jurisdiction, GAO will dismiss the protest unless the court specifically expresses interest in receiving a decision from GAO. For example, where a protester/plaintiff sought but failed to obtain a preliminary injunction to restrain agency action pending a GAO decision on its protest, the case was still pending before the court, and the court did not express any interest in receiving a GAO decision, GAO dismissed the protest. CSA Reporting Corporation, B-196545, December 21, 1979, 79-2 CPD 432. Also, a dismissal of a suit with prejudice is a final adjudication on the merits which precludes GAO consideration of the case. Perth Amboy Drydock Company, B-184379, November 14, 1975, 75-2 CPD 307. The same is true where the court has issued a permanent injunction. Oceaneering International, Inc., B-193585(2), January 30, 1979, 79-1 CPD 71. On the other hand, if there is no final adjudication by the court and the suit is dismissed without prejudice, GAO will consider the protest provided it is timely. See e.g., Optimum Systems, Inc., 56 Comp. Gen. 934 (1977), 77-2 CPD 165.

Finally, even where no protest is filed with GAO and the matter is being litigated solely before a court, it is possible that the court may request GAO's opinion on issues in the suit. GAO rendered an opinion to a Federal district court in such circumstances in United States District Court for the District of Columbia, 58 Comp. Gen. 451 (1979), 79-1 CPD 301.

SECTION VII--Claims for Bid and Proposal Preparation Costs

In Heyer Products Company, Inc. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956) the Court of Claims held that the submission of a bid in response to a solicitation creates an implied contract obligating the Government to give fair and honest consideration to the bid, and that if this contract is breached a bidder could potentially recove the cost of preparing its bid. The only circumstances recognized in Heyer as constituting a breach of the implied contract was essentially subjective bad faith by the Government, i.e., the fraudulent inducement of bidders to submit bids as a pretence to conceal the purpose of awarding t some favored bidder or bidders, and with the intent of wilfully disregarding the obligation to award on the basis of the bid most advantageous to the Government. Later cases amplified the Heyer standard. See, particularly, Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974), which indicated that the ultimate standard is whethe the Government's conduct was arbitrary and capricious toward the bidder-claimant, and that this standard could be satisfied in several ways, including subjective bad faith, no reasonable basis for the agency's action, a sliding degree of proof commensurate with the amount of discretion entrusted to the procurement officials by statute or regula tion, or possibly by proven violation of pertinent statutes or regulations.

The first cases in which claimants actually succeeded in recovering bid preparation costs were Armstrong & Armstrong v. United States, 356 F. Supp. 514 (E.D. Wash. 1973), affirmed, 514 F.2d 402 (9th Cir., 1975), and The McCarty Corporation v. United States, 499 F.2d 633 (Ct. Cl. 1974). Both cases involved erroneous corrections of mistakes in bids by the Government. The first of several GAO decisions allowing recovery of bid preparation costs was T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345, which involved a low bid erroneously rejected as nonresponsive. Also noteworthy is Amran Nowak Associates, Inc. 56 Comp. Gen. 448 (1977), 77-1 CPD 219, the first case in which an offeror in a negotiated procurement recovered its proposal preparation costs.

Thus far there have been relatively few cases dealing with the subject of what expenses can legitimately be considered bid or proposal preparation costs. T&H Company, supra, found that a portion of the claim consisted not of bid preparation costs but protest costs, which were held noncompensable. Also, the profits which the claimant would have earned under the contract are not recoverable. See generally Bell & Howell Company, 54 Comp. Gen. 937 (1975), 75-1 CPD 273.

Finally, it should be noted that GAO has adopted the policy that claims for bid or proposal preparation costs will be considered only in connection with protests which were timely filed under GAO's Bid Protest Procedures. DWC Leasing Company, B-186481, November 12, 1976, 76-2 CPD 404. Thus, a claim based on issues in a protest untimely filed will not be considered. See, e.g., Mil-Air, Inc., B-191424, July 20, 1978, 78-2 CPD 55.

While relatively few claimants have recovered bid or proposal preparation costs, the remedy is still a new one; most of the significant developments in the case law have taken place since 1970. The above discussion is not an all-inclusive treatment but rather is intended simply to point out some of the highlights in this still-evolving area.

CHAPTER 3

FORMAL ADVERTISING

SECTION I--Introduction

Federal Government procurements are accomplished by either of two methods: by formal advertisement or by negotiation. Formal advertised bidding consists of four distinct steps: the issuance of an invitation for bids which contains specifications describing the actual minimum needs of the Government; the submission of sealed bids; a public opening of the sealed bids at a specified time and place; the award of a contract to the lowest responsible bidder whose bid conforms in all material respects to the requirements of the invitation for bids.

Negotiation, on the other hand, does not involve a rigid set of formalized procedural steps and may be defined to include all methods of procurement other than formal advertising. However, care should be taken not to equate competition with formal advertising, since negotiation is requir to be competitive to the extent practical. The process of negotiation usually entails a series of proposals and counte proposals in contrast to the "one shot" procedure which characterizes formal advertisement.

The underlying reasons prompting the adoption of formal advertising for bids as the preferred procedure in Federal procurement have been stated numerous times by the courts an the Comptroller General. In defining the purposes of the advertising requirements the Comptroller General said:

> "The clear purpose of the law [3709 R.S.] in this regard is to restrict the uses of appropriations to the acquiring of actual Government needs; to secure such needs at the lowest cost; and to guard against injustice, favoritism, collusion, graft, etc., in the transacting of the public business." 13 Comp. Gen. 284 (1934), at 286.

See also United States v. Brookridge Farm, 111 F.2d 461 (1940).

Although formal advertising is the traditional mode of procurement by the Government, many exceptions to advertisir have been provided by statutes which permit negotiation in specified instances. Moreover, however desirable advertised competitive bidding may be as a procedure in securing advantageous contracts for the Government, procurement by negotiation has assumed an increasingly larger role in recent years By far the greater portion of procurement expenditures is now effected under negotiated contracts.

History of advertising

Prior to World War II nearly all procurement contracts made by the executive departments of the Government were required to be made in conformity with the advertising provisions of R.S. 3709. However, R.S. 3709 itself contained enumerated exemptions upon which much of the present day negotiation authority is based; in addition, many exceptions to the advertising requirements were provided by subsequent legislation. On December 18, 1941, the First War Powers Act, 1941, 55 Stat. 838, was enacted as temporary emergency legislation empowering the President to authorize entering into contracts without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deemed such action would facilitate the prosecution of the war. This authority has since in effect been enacted into permanent law by P.L. 85-804, 50 U.S.C. 1431-1436.

Upon the termination of World War II, studies were initiated for the purpose of developing comprehensive procurement procedures for the military departments. After extensive Congressional hearings, the Armed Services Procurement Act of 1947 was passed. The Act now has been codified into sections 2301-2314 of title 10, United States Code. Many important procurement provisions are contained in the 13 sections of the Armed Services Procurement Act of 1947 as originally passed. Insofar as the award of defense contracts is concerned, perhaps the most significant and far reaching of these provisions are those found in 10 U.S.C. 2304. That section, after setting forth the requirement of formal advertising as the normal procurement procedure, lists seventeen situations where procurement by negotiation is permitted. See chapter 4 for specific discussion.

Specific procedures for complying with advertising requirements are provided by section 2305(a), (b) and (c) of title 10 of the Code:

> "(a) Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned***.

"(b) The specifications in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not accessible to all competent and reliable bidders, the invitation is invalid and no award may be made.

"(c) Bids shall be opened publicly at the time and place stated in the advertisement. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest."

Many of the same underlying problems which prompted the enactment of the Armed Services Procurement Act continued to exist with respect to procurement procedures utilized by executive departments and agencies not covered by the 1947 act. As a result, the Congress enacted the comprehensive Federal Property and Administrative Services Act of 1949, 63 Stat. 377-403. Title III of the Act, 41 U.S.C. 251-260, dealing with procurement procedures, specifies the legal requirements applicable to advertising and negotiation. Except for a few appropriate changes, this title follows in structure and is substantively identical to the Armed Services Procurement Act.

Important limitations on the applicability of the procurement procedures of title III to certain programs and agencies were imposed by the provisions of section 502(d) of the Act (40 U.S.C. 474). Twenty enumerated programs and/or agencies have been exempted from the requirements of title III. Among these are:

1. the Department of Energy and the Nuclear Regulatory Commission (formerly known as the Atomic Energy Commission).

2. the Central Intelligence Agency.

3. any executive agency named in the Armed Services Procurement Act of 1947.

4. the Secretary of State under the Foreign Service Building Act of May 7, 1926, as amended.

5. any executive agency with respect to any phase (including procurement) of any program conducted for purposes of resale, price support, grants to farmers, stabilization, transfer to foreign governments, or foreign aid, relief or rehabilitation. However, to the maximum extent practicable, the agency carrying out one of the enumerated programs above is expected "consistent with the fulfillment of the purposes of the program and the effective and efficient conduct of its business," to coordinate its operations with the requirements of title III.

6. the Tennessee Valley Authority in certain specific instances.

7. the disposal of airport and airway property for use as such property.

8. the United States Postal Service.

9. the United States Maritime Administration with respect to the construction, reconstruction, and reconditioning, the acquisition, procurement, operation, sale, lease, etc., of any merchant vessel or of any shipyard, ship site, terminal, pier, dock, warehouse, or other installation necessary or appropiate for the carrying out of any administration program authorized by law, or nonadministrative activities incidental thereto.

10. certain programs of the Departments of Agriculture and Housing and Urban Development.

Even though the 1947 and 1949 procurement acts have, in fact, superseded R.S. 3709 in most areas, the latter is still on the statute books and it can be said that most of the legal decisions based on it continue to be valid and will serve as guidelines for interpreting the later acts. For example, in 37 Comp. Gen. 550 (1958), after a review of the legislative history of the 1947 act, it was held the phrase "other factors considered," 10 U.S.C. 2305(c), was not intended to broaden the scope of existing authority or to introduce new factors into evaluation of bids justifying award to other than the low responsible bidder.

Accordingly, despite the departures in language with regard to award of contracts, it appears clear that the Congress did not intend in enacting the 1947 and 1949 acts to make a drastic or radical change in the previous law respecting the legal requirements and mechanics of formal advertising.

SECTION II--Use of Advertising

The Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949 are the two basic authorities in the overwhelming number of instances of procurement by the Federal Government. In most cases the legality of a particular procurement can be determined by reference to one of those acts. However, it must be emphasized that many independent or collateral statutes have been passed, both prior and subsequent to those statutes, which contain their own provisions prescribing advertising or negotiation procedures for use in a particular procurement. Moreover, appropriation acts not infrequently exempt expenditures for certain projects from the operation of the normal procurement statutes.

Accordingly, the following general principles may be inapplicable in specific instances, and although a full discussion as to when to advertise must deal with the specific exemptions in the 1947 and 1949 acts, this discussion will consider only general exceptions deriving from R.S. 3709. Further, since the two major methods of procurement are mutually exclusive, the question of when advertising is required must, by necessity, consider when negotiation is permitted. To that extent this subject will preface the material in chapter 4.

Amount not in excess of $10,000

The first monetary exemption for small purchases appear in R.S. 3709 and has gradually been increased to its present amount. This monetary exemption consistently has been held not to authorize a succession of small purchase amounting, i the aggregate, to a larger sum than the limit merely to avoi compliance with the advertising requirements. 5 Comp. Gen. 41 (1925).

Public exigency

This exception is one of the original exceptions (the other is personal services) included in the first advertisin

act of March 2, 1861, 12 Stat. 214 at 220. A public exigency requiring the immediate delivery of articles which obviates the necessity of advertising has been defined as "a sudden and unexpected happening; an unforeseen occurrence or condition; a perplexing contingency or complication of circumstances; or a sudden or unexpected occasion for action." Good Roads Machinery Co. of New England v. United States, 19 F. Supp. 652 (1937). The imminent expiration of fiscal year funds is not a public exigency. B-160004, October 17, 1966.

One source of supply

Clause 3 of R.S. 3709 specifies that advertising is not required "when only one source of supply is available and the Government purchasing or contracting officer shall so certify." However, a mere conclusion or opinion of a contracting officer that a particular manufacturer is the sole source capable of meeting the needs of the Government is not enough. Rather, his certification of such a condition should be accompanied by a statement of facts from which it has been concluded that the vendor is the only source of supply. DAR 3-210.3.

With regard to patents and sole source suppliers see 38 Comp. Gen. 276 (1958), where it was held that procurement involving patented articles are required to be made by formal advertising and the use of negotiation solely on the basis that awards to other than valid patent holders or licensees would impair the patent system is improper in view of the specific authority in 28 U.S.C. 1498 afforded the Government to use patents and the remedy afforded patentees for patent infringements.

Personal services

Clause 4 of R.S. 3709 provides that advertising is not required "when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis." The exception of personal services from the advertising requirements of R.S. 3709 has been said to be "identified with and attaches to the individual--and goes to the character or status of the one contracting and means that the personal element predominates--and necessitates that there be selection of the person and that the contracting be directly with and binding upon that person." 9 Comp. Gen. 169 (1929).

Administrative expenses of wholly owned Government corporations

The last paragraph of R.S. 3709 imposes the advertising requirement on administrative transactions only in the case of wholly owned Government corporations.

Additional work or quantity

Ordinarily the modification of a contract is legally permissible and Government contracts usually contain express clauses for just such a purpose. However, additional work must be advertised if it is of a considerable magnitude, unless the additional work was not in contemplation at the time of the original contracting and it is such an inseparable part of the work originally contracted for as to render it reasonably impossible of performance by other than the original contractor. 37 Comp. Gen. 524 (1958); 39 id. 566 (1960).

Contract renewals

Generally it has been held that it is not compatible with the intent of R.S. 3709 to effect new contracts by renewals under option provisions without obtaining competition for the period of renewal. 41 Comp. Gen. 682 (1962); 42 id. 272 (1962).

However, since it has been held that no particular form of advertising is required by the statute, the General Accounting Office has in certain instances accepted proper surveys or informal solicitation as adequate compliance. 16 Comp. Gen. 931 (1937); 33 id. 90 (1953). Attention also should be given to the possibility that the exercise of the option may be prohibited as beyond the extent and availability of existing appropriation. See chapter 1, section

No useful purpose to be accomplished

An early opinion of the Attorney General, 17 Op. Atty. Gen. 84, states that the design of R.S. 3709 in requiring advertisements for proposals before making purchases and contracts for supplies, is to invite competition among bidders and it contemplates only those purchases and contracts where competition as to the article needed is possible. In line with this view of the statute the Comptroller General at various times has held that R.S. 3709 does not require advertising where it is impracticable and can accomplish no

useful purpose. 1 Comp. Gen. 748 (1922); 7 id. 282 (1927); 28 id. 470 (1949); 36 id. 31 (1956). This determination, of course, must be made on an individual basis and the contracting officer's opinion if supported by a reasonable basis must be given great weight.

SECTION III--Solicitation of Bids

Having discussed generally when advertisement may not be required, we now turn to the mechanics of formal advertisement.

Neither R.S. 3709, the Armed Services Procurement Act, nor the Federal Property and Administrative Services Act prescribes detailed procedures to be followed in advertising for bids. As a result the selection of a particular method of advertising is left to the discretion of the department making the procurement. 15 Op. Atty. Gen. 226; 3 Comp. Dec. 175; 21 Op. Atty. Gen. 595. However, in the exercise of this discretion the department's solicitation of bids must be adequate to invite full and free competition. This general rule for the adequacy of bid solicitation was stated in 14 Comp. Gen. 364 (1934) as follows:

> "The statute, section 3709, Revised Statutes, does not require publication in newspapers in each case but contemplates such publicity as will offer probable bidders notice thereof and proper opportunity to bid.
>
> Hence, any method of advertising that gives all available competition under the circumstances of the particular case, generally, will be accepted by the accounting officers as a compliance with the requirements of the statute."

In accordance with the rule that the bid solicitation must be adequate to provide full and free competition, the invitations for bids and specifications must be such as to permit competitors to compete on a common basis. Thus, conditions or limitations which have no reasonable relation to the procuring Department's actual needs and which limit the available sources of supply are prohibited and render the award of a contract made under such circumstances voidable. United States v. Brookridge Farm, Inc., 111 F.2d 461 (1940).

Current procedures for use in soliciting bids are prescribed by departmental procurement regulations. Regulatory

provisions promulgated by the Department of Defense to supplement the Armed Services Procurement Act of 1947 are known as the Defense Acquisition Regulation (DAR) and can be found in title 32, Code of Federal Regulations. Regulations promulgated by the General Services Administration to supplement the Federal Property and Administrative Services Act of 1949 are known as the Federal Procurement Regulations and are found in title 41 Code of Federal Regulations.

DAR 1-102 provides that "This Regulation shall apply to all purchases and contracts made by the Department of Defense, within or outside the United States (but see 1-109.4), for the procurement of supplies or services which obligate appropriated funds (including available contract authorizations) unless otherwise specified herein * * *."

The FPR's are applicable to all Federal agencies to the extent specified in the Federal Property and Administrative Services Act of 1949 or in other law, but are not mandatory on the agencies specified in 10 U.S.C. 2303 except with respect to standard Government forms and clauses, Federal Specifications and Standards, procurement of automatic data processing equipment or services and except as directed by the President, the Congress or other authority. The regulations apply to procurements made within and outside the United States unless otherwise specified. FPR 1-1.004. See also FPR 1-1.005 dealing with other possible exclusions from the regulations, and FPR 1-1.008 for provisions with regard to additional procurement regulations to be issued by individual agencies to implement and supplement the FPR's. The National Aeronautics and Space Administration has promulgated regulations pursuant to authorization in the National Aeronautics and Space Act of 1958, which govern its procurement activities These regulations, commonly referred to as NASAPR, closely follow DAR.

Turning now to the applicable procurement regulations dealing with advertising and solicitation methods, initial mention should be made of DAR 2-102.1. That paragraph, in general, provides that in accordance with the advertising requirements of 10 U.S.C. 2304(a) procurements shall generally be made by soliciting bids from all qualified sources of supplies or services deemed necessary by the contracting officer to assure full and free competition consistent with the procurement of the required supplies or services. Current lists of bidders shall be maintained in accordance with DAR 2-205. See also FPR 1-2.102 to the same effect.

Mailing lists

Perhaps the most effective means of soliciting bids and publicizing procurement needs is through direct mailing of solicitations or notices of procurements to prospective bidders. Mailing lists are established for this purpose and are used extensively by the Government. When a bidder's mailing list is extremely long, a great deal of expense and delay can be saved by sending a brief procurement notice to bidders announcing in general terms that a specified procurement will take place at a certain time. Distribution of the formal invitation is limited to those bidders who by responding have indicated an intention to bid. For detailed procedures see DAR 2-205 and FPR 1-2.205.

Commerce Business Daily

Another equally effective means of obtaining publicity in procurement actions is through the "Commerce Business Daily," which is published by the Department of Commerce and is distributed throughout that Department's field offices, as well as other Government agencies; it provides industry with information concerning current Government contracting and subcontracting opportunities, including information as to the identity and location of contracting offices and prime contractors having current or potential need for certain requirements. This publication is especially effective to reach potential suppliers outside of the local area in which the need arose.

Newspaper advertising

Although a brief announcement of a proposed procurement may be made available to newspapers, trade journals and magazines for free publication, paid advertisements in newspapers generally may not be used. 44 U.S.C. 3702. Whenever such use is deemed necessary to secure effective competition, the restrictions imposed by 44 U.S.C. 3703 must be satisfied.

Oral solicitation

As noted the advertising statutes do not require bid solicitations to be conducted in a particular manner. It also has been held that they do not prohibit oral solicitations of bids and this method may be used provided that under the particular circumstances involved reasonable publicity is given and all available competition is obtained.

However, this method of solicitation is not favored and should be avoided when possible. The bids received pursuant to any advertisement must be in writing to comply with the requirement for public opening. 10 U.S.C. 2305(c); 41 U.S.C. 253(b).

Telegraphic solicitation

The General Accounting Office has ruled, A-59512, January 11, 1935, that telegraphic solicitation of bids is not authorized under R.S. 3709 in the absence of an unanticipated emergency as such method of solicitation would not provide sufficient time to permit maximum competition. Currently, DAR 2-202.2 and FPR 1-2.202-2 provide, in substance, that as a general rule telegraphic bids will not be authorized except when, in the judgment of the contracting officer, the date for bid opening will not allow bidders sufficient time to prepare and submit bids on prescribed forms, or when prices are subject to frequent changes. Telegraphic bids should and will be rejected unless authorized by the invitation for bids. 40 Comp. Gen. 279 (1960); B-161595, August 17, 1967.

Sufficiency of advertising

While the sufficiency of advertising depends primarily upon the character of the purchase or service, a review of the decisions dealing with the problem reveals that in those cases where the advertisement is found insufficient, it is usually a result of either (1) the lack of adequate circularization or publicity given the notice of procurement or invitation for bids, or (2) the lack of adequate time allowed for submitting bids. See 45 Comp. Gen. 651 (1966); 52 Comp. Gen. 569 (1973).

Normally, advertising will be insufficient where a procurement is intentionally restricted to either a geographi area or a group of suppliers whom the procuring agency desire to award the contract. However, in view of the fact that agencies have some discretion to determine the extent of competition which may be required consistent with their needs, some intentional restrictions have been held valid. See 36 Comp. Gen. 809 (1957). But where a prospective bidder is not solicited due to inadvertence or oversight by the contracting officer, the general rule is that such failure is not sufficient reason to require rejection of all bids or cancellation of an award and subsequent readvertisement. 34 Comp. Gen. 684 (1955).

Finally, while the current principal procurement statutes all provide that advertisements for contracts must be made a sufficient time before the award of a contract, none of the statutes attempt to define the term "sufficient." Several of the previous procurement statutes actually set out a specified period of time for advertising prior to contract award. 10 Stat. 93; 5 Stat. 526. Also DAR 2-202.1 and FPR 1-2.202-1 set forth guidelines as to sufficiency of bidding time. See also DAR 1-1003.2 on time for publication of the synopsis of a proposed procurement.

SECTION IV--Invitation For Bids

Generally, in Government procurement the acceptance of a bid conforming to the material requirements and terms of the invitation for bids consummates a contract. This means that in formally advertised contracts the Government, as the offeree, dictates the terms for contract formation. This departure from the normal contract formation procedures discussed in chapter 2 with regard to offer and acceptance is necessitated by the statutory limits placed upon the means by which agents of the Government may contract. These restrictions on the bargaining procedure, characteristic of private contracts, are fundamental to formal advertising.

The "one shot" competitive bid procedure is designed, among other things, to afford all prospective bidders an equal opportunity to do business with the Government and in return secure the best possible bargain for the benefit of the public. To achieve these results all bidders must be afforded an opportunity to bid on a common basis or, more specifically, they must all have an opportunity to bid in the same manner, at the same time, on the same contract, and have their bids evaluated on the same predetermined basis. See United States v. Brookridge Farm, 111 F.2d 461 at 463 (1940).

The invitation for bids describes the terms upon which the Government will contract, and invites bids for the supplies or services in accordance with those conditions. FPR 1-2.101 defines an IFB as "the complete assembly of related documents (whether attached or incorporated by reference) furnished prospective bidders for the purpose of bidding." Obviously the IFB can either promote or restrain competition among bidders. To the extent that the needs of the Government set forth in the specifications are described inadequately or too narrowly, competition is restrained.

Likewise, competition will be impeded if the terms for contracting are too burdensome or unduly strict.

Restrictions in the IFB

There are many types of competition-restricting conditions that may be imposed by an IFB. Some of the restrictions are reasonably related to the accomplishment of the legislative purpose of the appropriation act under which the contract is made, or are provided for by the general procurement authority involved, such as standardization of parts. Still other restrictive conditions are imposed by statutes for public policy reasons. A few examples of the latter are the Buy American Act, 41 U.S.C. 10 a-d; Walsh-Healey Act, 41 U.S.C. 35-45; Davis-Bacon Act, 40 U.S.C. 276a; and the Small Business Act, 15 U.S.C. 631-647. These restrictions are, as a result, quite proper. Of primary concern are restrictions imposed upon competition through administrative discretion, especially the manner in which the goods or services being procured are described in the specifications.

Specifications

The term "specification" has been defined as "a clear and accurate description of the technical requirements for a material, product, or service, including the procedure by which it will be determined that the requirements have been met." FPR 1-1.305. In addition to specifications, "standards" are also utilized in defining the product to be procured. Standards have been defined as "descriptions which establish engineering or technical limitations and applications for materials, processes, methods, designs, or drafting room and other engineering practices, or any related criteria deemed essential to achieve the highest practical degree of uniformity in materials or products, or interchangeability of parts used in those products; and which may be used in specifications, invitations for bids, proposals, and contracts." FPR 1-1.306.

Specifications have been classified by FPR 1-1.305 into four distinct categories:

> "(a) Federal. A specification covering those materials, products, or services, used by or for potential use of two or more Federal agencies (at least one of which is a civil agency), or new items of potential general application, promulgated by the General Services Administration and mandatory for use by all executive agencies.

"(b) Interim Federal. A potential Federal specification issued in interim form, for optional use by agencies. Interim amendments to Federal Specifications are included in this definition.

"(c) Military (MIL.). A specification issued by the Department of Defense, used solely or predominantly by and mandatory on military activities.

"(d) Departmental. A specification developed and prepared by, and of interest primarily to a particular Federal civil agency, but which may be of use in procurement by other Federal agencies."

A similar functional classification of Standards into four categories is made by the FPR's. See FPR 1-1.306.

The FPR and DAR contain various provisions concerning the required or optional use of specifications and standards. Thus, FPR 1-1.305-1 provides that Federal Specifications shall be used by all executive agencies, including the Defense Department, in the procurement of supplies and services covered by such specifications except in certain specified situations. (Compare DAR 1-1202.) See also the following FPR sections for the subjects specified: 1-1.305-4 "Optional use of Interim Federal Specifications"; 1-1.305-5 "Use of Federal and Interim Federal Specifications in Federal construction contracts"; 1-1.305-6 "Military and departmental specifications"; and 1-1.306-1 "Mandatory use and application of Federal Standards." In those situations where no applicable formal specifications exist or where Government specifications or standards are not required to be used, DAR and the FPR authorize the use of purchase descriptions to describe the product to be procured. See FPR 1-1.307-1; DAR 1-1206. A purchase description should set forth the essential physical and functional characteristics of the materials or services required.

The preparation and establishment of specifications to reflect the needs of the Government and the determination of whether products offered meet those specifications are matters primarily within the discretion of the procurement agency. 17 Comp. Gen. 554 (1938); 38 id. 190 (1958); 39 id. 570 (1960); 44 id. 302 (1964). Many bid protests handled by GAO concern alleged defective or restrictive specifications. The judgment of the procuring agency is accepted unless there is clear and convincing evidence that the agency opinion is in error and that a contract awarded on the basis of such

specifications would be a violation of law. 40 Comp. Gen. 294 (1960). However, certain definitive guidelines or rules as to validity of specifications have evolved from the Comptroller General's opinions.

First, the specifications must be drafted so as to reflect the actual minimum needs of the Government, not what may be most desirable. 20 Comp. Gen. 903 (1941); 32 id. 384 (1953). However, the fact that only one bidder may be able to supply those needs does not in and of itself make the specifications restrictive. 44 Comp. Gen. 27 (1964); 45 id. 365 (1965); Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181.

Second, the specifications should be sufficiently definite and clear to permit the preparation and evaluation of bids on a common basis so as to obtain the benefit of full and free competition. 36 Comp. Gen. 380 (1956). This simply stated means that the specifications must be clear and unambiguous. Specifications which permit variations of the stated requirements do not provide a common basis for bid evaluation unless the extent of the permissible variation is quantified. 44 Comp. Gen. 529 (1965); 43 id. 544 (1964).

In summary, the IFB and in turn the specifications must define clearly the actual minimum needs of Government; the manner in which the Government will contract for the needs, and the basis upon which offers to contract will be evaluated. This definition must be made in the manner which will promote the broadest field of competition while maintaining a known equal footing for competition.

Restrictive procurement

Before leaving the topic of IFB's some discussion should be made of those procurements wherein the agents of the Government cannot draft a set of adequate purchase specification or where prebidding restrictions are involved.

The brand name or equal specification or description is permissible for use where the particular features of a product are essential Government requirements. DAR 1-1206.1(However, when using this type of specification the "salient characteristics" of the brand name must be set forth so bidders may offer an "or equal." Otherwise the IFB is defective as being restrictive. 41 Comp. Gen. 76 (1961). Care should be taken, however, not to specify nonessential

features and thereby restrict competition. 43 Comp. Gen. 761 (1964); 45 Comp. Gen. 462 (1966). On the other hand, listing too few salient characteristics deprives the contracting agency of the right to reject as nonresponsive a bid which meets all the charateristics listed, even though the agency believes the offered product will not satisfy it's needs. 47 Comp. Gen. 501 (1968). The "or equal" language may properly be omitted only if it is determined that only the named brand will satisfy the Government's minimum needs; in such a case, however, negotiation should be used ordinarily, instead of formal advertisement. 39 Comp. Gen. 101 (1959); B-165555, January 24, 1969; B-166002, February 19, 1979.

A second restriction upon competition which may be imposed by the specifications involves the use of a qualified products list (QPL). Essentially, the use of a QPL limits consideration for contract award to bidders having their products listed on the QPL or qualified for listing prior to bid opening. 51 Comp. Gen. 415 (1972). DAR 1-1107.1(a). This procedure has been sanctioned by the Comptroller General where testing before award is necessary and either the time required, cost of, or equipment for testing are unusual. 36 Comp. Gen. 809 (1957). See DAR 1-1103. QPL's may be established only pursuant to standard Military or Federal Specifications. See DAR 1-1102.

The last generally permissible method for limiting competition by specifications is two-step formal advertising. This procedure was designed to permit wider use of advertising in procurements previously negotiated. DAR 2-501. The first step of this procedure involves the submission of technical proposals by offerors for evaluation by the procuring agency. After the technical evaluation, those offerors determined to be qualified are solicited for price proposals in the customary advertised manner, with award being made to the low bidder under the second step. No other firms may bid on the second step, and each bidder may bid only on his own technical proposals previously found acceptable.

SECTION V--Submission of Bids

It is fundamental to the competitive concept of formal advertising that the bidder bears the responsibility for submitting his bid in an acceptable manner. It is equally clear that to allow one bidder, after bid opening, to take some action materially affecting his bid so that it may be accepted

would be prejudicial to other competitors not afforded a similar opportunity. Therefore, to get the best initial price the one-shot bid procedure is used and material modification of bids after opening is forbidden.

In the majority of advertised procurements, a bidder submits his bid on a standard form supplied by the Government. In this case if his bid is unacceptable, it is often for failing to respond to items in the form schedule or for failing to sign the bid. However, if the bid otherwise demonstrates an intention of the bidder to be bound by the bid, failure to sign is minor. 48 Comp. Gen. 648 (1969). See also comment on minor informalities or irregularities in part on Responsive Bids.

Bidders sometimes are required or motivated to submit additional material with their bids. Examples are bid samples, descriptive literature, bid bonds, requests for progress payments, and requests for use of Government-furnished property. With the exception of the bid bond, the rule is simply that if these things are provided for in the invitation and they materially deviate from the IFB, then the bid submitted is conditional and may not be accepted. 36 Comp. Gen. 415 (1956); 46 id. 1 (1966); 54 id. 157 (1974); 46 id. 368 (1966); B-177889, June 26, 1973.

Similarly, where a bid bond is required in an invitation for a construction contract, or a bid sample or descriptive literature is required by an IFB for evaluation purposes, the failure to furnish the requested item requires that the bid be rejected. 36 Comp. Gen. 415 (1956); 38 id. 532 (1959). It is essential when requiring submission of bid samples or descriptive data with the bids that the IFB clearly advise bidders of the need for, and the result of the failure to submit, the required item. 36 Comp. Gen. 376 (1956).

Responsive bids

10 U.S.C. 2305(c) in essence states that award will be made to the responsible bidder whose bid conforms to the invitation and is low. The Comptroller General has consistently construed that provision to require rejection of a bid as nonresponsive which does not conform to a material provision of the IFB as otherwise bidders will not be competing on an equal basis or have their bids evaluated on the same basis. 41 Comp. Gen. 721 (1962). However, a deviation, which is a matter of form or is immaterial and has no effect on quantity quality or delivery and/or merely trivial effect on price,

may be waived as a minor informality or irregularity if it does not prejudice or affect the relative standing of bidders. DAR 2-405; FPR 1-2.405.

Once determined nonresponsive, a bid may not be made responsive after opening notwithstanding the reason for the failure to conform. 38 Comp. Gen. 819 (1959); 40 id. 432 (1961). F & H Manufacturing Corporation, B-184172, May 4, 1976, 76-1 CPD 297.

Responsibility of bidders

10 U.S.C. 2305(c) and 41 U.S.C. 253(b), provide for award to the low responsible bidder. This has been long understood to permit award to other than the low bidder when that bidder is found not capable of performing satisfactorily. 26 Comp. Gen. 676 (1947); 42 id. 532 (1963); 42 id. 717 (1963). Responsibility has been defined to cover the capacity to perform, the financial ability to perform, as well as the integrity, perseverance and tenacity of the bidder. 39 Comp. Gen. 468 (1959). The latter three qualifications reflect upon the desire or intent of a bidder to perform. All matters of responsibility may in the case of a small business concern be conclusively decided by the Small Business Administration through the issuance of a certificate of competency. DAR 1-705.4(a); 15 U.S.C. 637(b)(7) as amended by Public Law 95-89, August 4, 1977, 91 Stat. 553. See also chapter 5 on Procurement Policies.

It is important to distinguish responsibility from responsiveness. The former is not ascertained until the time for award, while the responsiveness of a bid is determined at opening and must be ascertained from the bid itself, not extrinsic evidence. 38 Comp. Gen. 819 (1959). In order properly to constitute a mattter of responsiveness, the information must be required for evaluation of the bid or in other words be an essential element of the promise to perform as required by the specifications, not the ability to carry out that promise, which is responsibility. A bidder's responsibility may change after opening prior to award due to many factors, but the bid must be responsive when opened.

Except for small business the determination of responsibility is left primarily to the contracting officer and is not questioned by the Comptroller General or the courts in the absence of a showing of bad faith or lack of reasonable basis. 43 Comp. Gen. 228 (1963); O'Brien v. Carney, 6 F.

Supp. 761 (1934). This rule is followed even though the same contractor may be given opposite findings by different contracting officers for separate contracts. 43 Comp. Gen. 257 (1963).

As noted in chapter 2, GAO no longer considers challenges against a contracting officer's affirmative determination of responsibility, except where the actions of procurement officials are tantamount to fraud or where the IFB itself sets forth objective responsibility criteria. SIMCO Electronics, B-187152, August 31, 1976, 76-2 CPD 209.

SECTION VI--Contract Award

The principal procurement statutes state that award shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be most advantageous to the United States price and other factors considered. 41 U.S.C. 253, 10 U.S.C. 2305. If a basis other than price is to be used in the evaluation, that basis and its effect must be stated in the IFB. 36 Comp. Gen. 380 (1956); 47 id. 272 (1967).

Award is made by mailing or otherwise furnishing to the bidder a properly executed award document or notice of award This action must be taken within the time specified for acceptance of the bid or any extension of the bid acceptance period. DAR 2-407.1; FPR 1-2.407-1. However, award may also be made if, after the expiration of the bid acceptance period, the bidder whose bid is most advantageous to the Government elects to accept an award on the basis of the bid submitted and if no other bidder would be prejudiced. 46 Comp. Gen. 371 (1966); Mission Van & Storage Company, Inc., et. al., 53 id. 775 (1974), 74-1 CPD 195.

Price and other factors considered

The phrase "other factors" has been urged as a basis for the contracting officer to make award to other than the low responsive responsible bidder. The Comptroller General has rejected that proposition stating that the phrase did not broaden the scope of the authority existing prior to enactment of current statutes nor did it introduce new factors into the evaluation process. 37 Comp. Gen. 550 (1958) The phase "other factors" does not provide any authority f modification of a contract once awarded and it does not ch the well-settled rule that to secure the advantages of

competition the contract to be awarded must be the contract offered to all bidders. 46 Comp. Gen. 275 (1966); 49 id. 584 (1970). Some of the "other factors" which may be considered are foreseeable inspection or transportation costs or delays, advantages resulting from multiple awards, qualified products, taxes, and application of the Buy American Act to foreign-made goods. See DAR 2-407.5.

Rejection of all bids

> "It has been held consistently that an invitation for bids does not impart any obligation to accept any of the bids received and all bids may be rejected where it is determined to be in the Government's interest to do so. 37 Comp. Gen. 760, 761, and the cases therein cited. The authority to reject all bids is not ordinarily subject to review by the courts or our Office. See B-118013, March 31, 1954; B-128422, August 30, 1956; B-131028, April 29, 1957; Harney v. Dunkee, 237 P.2d 561; 31 ALR 2d 469; Champion Coated Paper Company v. Joint Committee, 47 App. D.C. 141." (39 Comp. Gen. 86 (1959).)

This broad authority of the contracting officer to reject all bids after bid opening has been restricted by regulation to certain situations. DAR 2-404.1; FPR 1-2.404-1. These limitations on the discretion of the contracting officer were imposed in the interest of preserving the integrity of the competitive bidding systems and avoiding the prejudice to bidders at having prices disclosed. The Comptroller General has stated that IFB's should be canceled and bids rejected only for cogent and compelling reasons. See generally 39 Comp. Gen. 834 (1960); 49 Comp. Gen. 211 (1969); and Edward B. Friel, Inc., 55 Comp. Gen. 231 (1975), 75-2 CPD 164.

Cancellation of a contract after award

Ideally, the Comptroller General receives and considers bid protests before award of a contract. See chapter 2, supra. However, it sometimes occurs that award has been made before the protest is lodged with the General Accounting Office or the contracting officer. In that instance, if the protest is sustained and the Comptroller General feels required to object to the illegal obligation of money, the contract will be required to be canceled. When such action is taken the question arises as to what recovery may be had by the contractor awarded the illegal contract. The following rules were set out in 46 Comp. Gen. 348 (1966):

"There exists strong precedent for holding that a contract within the authority of the public body, which is invalid because it was entered into contrary to the statutory requirements, creates no right to payment of costs incurred where no benefits are received by the public body prior to contract cancellation. 40 Comp. Gen. 447; 43 Am. Jur., Public Works and Contracts, section 88; Vol. 10, McQuillin on Municipal Corporation, 3rd Ed., section 29.26; Prestex, Inc. v. United States, 162 Ct. Cl. 620.

"While a right to payment on a quantum valebant or quantum meruit basis is recognized by the courts and our Office, 21 Comp. Gen. 800; 33 id. 533, such right is predicated on the theory that it would be inequitable for the Government to retain the benefit of the labor of another without recompense. See 40 Comp. Gen. 447 (1967) and court cases cited therein."

As a result a contractor illegally awarded a contract may recover his costs only to the extent the Government received a benefit because those costs were incurred. Where the Court of Claims pursuant to its standards determines a canceled award to have been legally made the cancellation action has been viewed as a termination for convenience of the Government. John Reiner & Co. v. United States, 163 Ct. Cl. 381 (1963); Brown & Son Electric Co. v. United States, 163 Ct. Cl. 465 (1963).

The standard used by the courts and the Comptroller General for determining whether a contract award may be canceled is whether the award was "plainly or palpably illegal." If the contractor contributed knowingly to the defect in the award or was on direct and immediate notice that the procedure used by the agency was in violation of law or regulation, the contract is regarded as a nullity. Otherwise, even if a basic procurement principle has been ignored, a cancellation will be treated as a termination for convenience. See 52 Comp. Gen. 215 (1972).

CHAPTER 4

NEGOTIATION

SECTION I--Introduction

Negotiation often is defined simply as procurement without formal advertisement, and is characterized by the issuance of a request for proposals (RFP), similar in form to an IFB, in response to which proposals are received that may subsequently be modified or changed. The Commission on Government Procurement reported that, in terms of contract award dollars, 85 to 90 percent of the Federal Government's needs are satisfied through negotiated procurements.

Currently, the principal authorities to negotiate contracts are listed as exceptions to the advertising requirements of the Armed Services Procurement Act, 10 U.S.C. 2304, and the Federal Property and Administrative Services Act, 41 U.S.C. 252. The former statute provides 17 exceptions to the advertising requirement, and the latter act contains essentially all but two of those exceptions. The separate instances where negotiation is permissible will be considered in the following section. However at the outset, it should be noted that 10 U.S.C. 2304(a), by its language, and FPR 1-3.101(a), implementing 41 U.S.C. 252, require, that formal advertising be used if "feasible and practicable under the existing conditions and circumstances," even where one of the exceptions may apply. See also DAR 3-101(a).

Variance with formal advertising

Advertising, as discussed in chapter 3, involves the relatively inflexible process of sealed bids, public opening, and award to the low responsive, responsible bidder. Negotiation, on the other hand, usually involves, after receipt of proposals, the process of bargaining between the contracting officer or negotiator and suppliers or offerors to secure the best deal for the Government. In short, in negotiated procurement the Government has restored a large degree of the element of bargaining discussed in chapter 2. However, the auction technique or the practice of disclosing prices of competitors to obtain a price reduction from an offeror is prohibited. DAR 3-805.3(c).

Notwithstanding, Government procurement by negotiation, like procurement by formal advertising, requires that contracting officers observe impartiality toward all offerors. While negotiation procedures are more flexible than advertised procedures, such flexibility demands a greater degree of care on the part of the contracting officer to insure that all competitive offerors are treated fairly.

Determinations and findings

As noted previously in this section, a prerequisite to negotiation is the ascertainment that advertising is not feasible and practicable. Additionally, several of the specific exceptions warranting negotiation require high level determinations to be used as the basis for negotiation. As amended by Public Law 87-653, September 10, 1962, 10 U.S.C. 2310 requires written determinations and findings as a prerequisite to negotiation under exceptions 2, 7, 8, 10, and 11 - 16 of 10 U.S.C. 2304.

These determinations and findings (hereafter referred to as D&F's) must be in writing and made by the head of the agency. However, the head of the agency may delegate the power to make all D&F's except those for exceptions 11 - 16. Also the power to make the necessary D&F's for an expenditure not in excess of $100,000 under exception 11 may be delegated to the official responsible for the procurement. 10 U.S.C. 2311. D&F's for negotiation under exceptions 11 - 16 must clearly illustrate conditions described therein warranting deviation from advertising. D&F's for exceptions 2, 7, 8, 10, 12, and for property or supplies under exception 11 must clearly and convincingly establish that formal advertising would not have been feasible and practicable.

D&F's may be made to cover an individual contract or several contracts. A copy of each D&F together with the contract negotiated must be furnished the General Accounting Office and the D&F's shall be available within the agency for 6 years. D&F's are required also in negotiated civilian procurements under the similar exceptions to advertising. 41 U.S.C. 257; FPR 1-3.101(b)(2). While the findings of a D&F are final under 10 U.S.C. 2310 and 41 U.S.C. 257, the determination based on those findings is subject to limited review by GAO or the courts for the purpose of ascertaining if there is a reasonable basis to support it. See Department of Commerce et al., 57 Comp. Gen. 615 (1978), 78-2 CPD 84.

The December 1972 Report of the Commission on Government Procurement criticized the requirements for D&F's as "expensive, wasteful, and time-consuming." The Commission recommended that where competition is available, negotiation should be authorized as an acceptable and efficient alternative to formal advertising, that the procurement file disclose the basis for selection of competitive negotiation rather than formal advertisement, and that statutory provisions inconsistent with this simplified procedure be repealed. As of this time, however, the law remains as stated above.

SECTION II--Circumstances Permitting Negotiation

The following is a listing with commentary of the exceptions to 10 U.S.C. 2304 which permit negotiation when advertising is not feasible or practicable. The exceptions to 41 U.S.C. 252 permitting negotiation of civilian procurements are similar; but there are no authorities comparable to exceptions 14 and 16 of 10 U.S.C. 2304 available to civilian agencies.

(1) National emergency

Where it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President.

The national emergency declared by the President in 1950, and still in effect, resulted in negotiation of contracts under this authority. However, since the cessation of Korean hostilities in 1956 this authority has been severely limited by regulations, DAR 3-201, et. seq., and almost all procurements are negotiated under other exceptions.

(2) Public exigency

When public exigency will not permit delay incident to advertising.

The D&F issued by the appropriate official must establish that a public exigency exists and that advertisement would delay the procurement. An exigency exists if the interests of the Government will be seriously impaired if the supplies or services are not furnished by a specific date and if advertising will not meet the needs in time. While GAO has in the past accepted citations of "priority designators" (DAR 3-202) in D&F's as sufficient to establish the authority to negotiate on the basis of public exigency, it has also pointed out that such priority designators cannot be used as a substitute for facts justifying public exigency negotiation. Electrospace Systems, Inc., 58 Comp. Gen. 415 (1979), 79-1 CPD 264. Also, the existence of authority to conduct a negotiated procurement on the basis of public exigency does not automatically justify awarding a sole source contract. See, e.g., Non-Linear Systems, Inc., et al., 55 Comp. Gen. 358 (1975), 75-2 CPD 219.

(3) Purchases not in excess of $10,000

Aggregate amount involved is not more than $10,000.

(4) Personal or professional services

The purchase or contract is for personal or professional services.

These services must either be of a professional nature or, if personal, must be performed under Government supervision on a time payment basis and must be rendered by an individual, not a firm. This exception is not for use where services may be procured under one of the other exceptions to advertising.

(5) Services of educational institutions

The purchase or contract is for any service by a university, college, or other educational institution.

This exception should not be used where the contract is for less than $10,000 or is to be performed outside of the United States.

(6) Purchases outside of United States

The purchase or contract is for property or services to be procured and used outside the United States and the territories, commonwealth, and possessions.

DAR 3-206.2 provides that when this exception is available formal advertising shall not be used. The place of negotiation or execution of the contract has no bearing on the availability of this authority.

(7) Medicines or medical supplies

The purchase or contract is for medicine or medical supplies.

This exception should not be used when exceptions (3), (6) are applicable and in any case applies only to purchase of supplies peculiar to the field of medicine.

(8) Property purchased for resale

The purchase or contract is for property for authorized resale.

This exception should not be used where procurement may be negotiated under exceptions (3), (6), or (9). This ex-

exception applies only where appropriated funds are involved. DAR 3-208.2(a)

(9) Perishable or nonperishable subsistence supplies

The purchase or contract is for perishable or nonperishable subsistence supplies.

This exception is not for use where contract may be negotiated under exception (3) or (6).

(10) Impracticable to obtain competition

The purchase or contract is for property or services for which it is impracticable to obtain competition.

Broad discretion to negotiate is granted by this section. DAR 3-210.2 lists examples warranting negotiation such as sole source of supply and the impossibility of drafting adequate specifications. However, despite the breadth of this exception GAO has on occasion objected to its use. See, e.g., Cincinnati Electronics Corporation et al., 55 Comp. Gen. 1479 (1976), 76-2 CPD 286 (agency's desire to conduct negotiations to ensure offerors' understanding of admittedly detailed specifications was held insufficient to authorized negotiated procurement, where record did not show reasonable grounds to support conclusion it was impossible to draft specifications adequate for advertising).

This authority is not for use where any of the other 16 exceptions applies, except that it is used in preference to exeption 12, and for procurements for foreign military sales. DAR 3-210.3.

(11) Experimental, developmental, or research work

The purchase or contract is for property or services that he determines to be for experimental, developmental, or research work, or for making or furnishing property for experiment, test, development, or research.

This exception covers research contracts and supplies incident to research work. This exception should not be used for contracts with educational institutions; exception (5) should be utilized. This authority should not be used where negotiation is also authorized under exceptions (3) or (6).

(12) Classified purchases

The purchase or contract is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components.

This authority should not be used when negotiation may be authorized under any other exception; however, where both exception (4) and (12) are available, (4) will prevail.

(13) Technical equipment requiring standardization of parts

The purchase or contract is for equipment that he determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and procurement by negotiation is necessary to assure that standardization and interchangeability.

Generally, this authority should not be used for procurement of equipment for use within the continental United States and only for equipment for which there is a recurring requirement.

(14) Technical equipment requiring substantial initial investment

The purchase or contract is for technical or special property that he determines to require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising would be likely to result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement after the property.

The head of the agency must find in this exception t advertising that either a substantial initial investment extended period of preparation is required and, second, t formal advertising would either delay the procurement or more costly. This exception authorizing negotiation is r available for civilian procurements under 41 U.S.C. 252.

(15) Negotiation after advertisement

The purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable

to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier.

This authority may be used to negotiate only for certain items covered by an invitation where the bids for those items are unreasonable or not independently arrived at.

(16) National defense or industrial mobilization

He determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved.

This exception like (14) is available only to defense agencies for authorization to negotiate. Under this exception and exception (11) the agency is required to maintain a record of the identity of any contractors, the nature of the contracts and the amount of the contracts negotiated pursuant to this authority.

(17) Otherwise authorized by law

Negotiation of the purchase or contract is otherwise authorized by law.

This exception is simply to avoid unintended conflict between the two major procurement statutes and other statutes authorizing negotiation for a specific procurement.

SECTION III-Negotiation Procedures

"The term 'negotiation' generally implies a series of offers and counteroffers until a mutually satisfactory agreement is concluded by the parties. 10 U.S.C.

2304(g) implements and clarifies the definition of 'negotiate' in 10 U.S.C. 2302(2) and it is our view that term 'negotiate' must be read in conjunction with 10 U.S.C. 2304(g) to include the solicitation of proposals and the conduct of written or oral discussions, when required, as well as the making and entering into a contract. See page 5 of House Report No. 1638, on H.R. 5532, 87th Congress, which was enacted as P.L. 87-653, adding the new subsection (g) to 10 U.S.C. 2304(a).

"Negotiation has been defined as 'the deliberation which takes place between the parties touching a proposed agreement'. Bouvier's Law Dictionary. It also has been defined as 'the deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale, or other business transaction'. Black's Law Dictionary.

"We have held that:

'[It is] contend[ed] also that [offeror] was permitted to increase his price in the course of negotiations to include items originally excluded from the proposal. The contract was awarded pursuant to negotiation. The term 'negotiation' implies a series of offers and counteroffers until a mutually satisfactory agreement is concluded by parties. The fact that [the offeror-contractor] may have been permitted to amend his proposal in the course of negotiations would not invalidate the resulting contract.' B-151013, April 16, 1963." 48 Comp. Gen. 449 (1968).

The above definition points out the inherent flexibility in procurement by negotiation. Since negotiation involves discussion as an important part, it is requisite to determine when to discuss, what to discuss, with whom to discuss and how to end discussions once initiated.

Prior to actually negotiating the contract the contracting officer must solicit the maximum possible sources of supply to assure full and free competition. Usually, this is done in writing by means of a request for proposals similar in form to the invitation for bids. A principal difference between the request for proposals and invitation for bids may be the type of contract offered to suppliers.

Formal advertising employs the fixed-price contract; negotiated contracts may be any type except cost-plus-a-percentage-of-cost. The RFP, like the IFB, should set forth all significant matters which affect the opportunity of suppliers to compete on an equal basis such as delivery schedules, type of contract, closing date, and special evaluation factors. DAR 3-501. Primarily as a result of recommendations in a number of GAO decisions, both the DAR and the FPR's now require that RFP's state not only the evaluation factors but also their relative importance. See DAR 3-501(b)(3)(D)(i) and FPR 1-3.802(c). The FPR's allow the disclosure in the RFP of numerical weights attached to evaluation factors, but DAR prohibits including this information in RFP's. In regard to the effect of evaluation factors on determining which offeror will receive the award, see "Evaluation and Selection", infra.

Awarding on initial proposal basis

With the enactment of Public Law 87-653 on September 10, 1962, an affirmative requirement to conduct discussions with offerors was established. That requirement is now found as subsection (g) to 10 U.S.C. 2304. Although this law applies only to military procurement, its substantive provisions have been adopted by the FPR for civilian negotiated procurements as well. FPR 1-3.805-1.

Essentially, the contracting officer is required after receipt of initial proposals to conduct written or oral discussions with all responsible offerors who submit proposals within a competitive range. This does not include offerors whose initial proposals are late. See DAR 3-506; FPR 1-3.802-1,2. Certain situations are prescribed both by law and regulation in which discussions after receipt of the initial proposals are not required. First, the aggregate amount of the procurement does not exceed $10,000. Second, procurement is for supplies for which prices or rates are fixed by law or regulation. Third, time for delivery will not permit discussions. Fourth, the procurement represents the set-aside portion of a partial set-aside for small business or labor surplus area concerns, or small business restricted advertising. Fifth, the procurement is for a product and, due to existence of adequate competition or accurate prior cost experience, it can be clearly demonstrated that acceptance of an initial proposal would result in a fair and reasonable price.

In a negotiated procurement for a fixed-price contract, the failure to conduct discussions, except under the exigency exception, may result in a rather incongruous situation since negotiation must be justified on the basis that formal advertising is not practicable or feasible, but the procedure used closely resembles advertising if award is made without oral or written discussions with the offerors.

What information the contracting officer should take into consideration when deciding whether to conduct discussions sometimes presents a question. The general rule is that the decision to make an award on the basis of initial proposals is discretionary in nature. 53 Comp. Gen. 5 (1973). However, there are some principal guidelines in this area which were first set forth in 47 Comp. Gen. 279 (1967). After receiving six proposals in response to a solicitation the contracting officer made award on one without discussion on the basis that the competition demonstrated that the price was fair and reasonable. However, prior to award one offeror reduced his proposal by a late modification to an amount 15 percent below the contract award price. The Comptroller General in his decision advised that while the late modification could not be considered as a basis for award, DAR 3-506, it should have been considered by the contracting officer in reaching his decision as to whether the initial proposals reflected a fair and reasonable price so that negotiations did not have to be conducted with all those within a competitive range. In short the contracting officer should consider all relevant facts available, not simply the alternative initial proposals, in determining reasonableness of price. It must also be noted that in appropriate circumstances an award on an initial proposal basis may be made to other than the lowest-priced offeror, e.g., where the RFP calls for the selection to be made in terms of the most favorable price/technical quality ratio. See Shapell Government Housing, Inc., et al., 55 Comp. Gen. 839 (1976), 76-1 CPD 161. Finally, discussions must be conducted with all competitive offerors if any one of them is permitted to make a substantive modification after initial proposals have been submitted. 51 Comp. Gen. 479 (1972); 53 id. 139 (1973).

Competitive range

As already noted, except for circumstances where award is made on the basis of the initial proposals, written or oral discussions are required to be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered. GAO has

held that competitive range encompasses both price and technical considerations and that either factor can be determinative of whether an offeror's proposal should be included. 52 Comp. Gen. 382 (1972). Exclusion from the competitive range is not justified merely because a proposal is technically inferior, though not unacceptable. 45 Comp. Gen. 417 (1966). In that decision and a number of subsequent cases, GAO has said that discussions should be conducted unless the offeror's proposal is so technically inferior as to preclude the possibility of meaningful negotiations. 48 Comp. Gen. 314 (1968); Magnetic Corporation of America, B-187887, June 10, 1977, 77-1 CPD 419. DAR 3-805.2(a) provides that the competitive range shall include all proposals which have a reasonable chance of being selected for award, and that when there is doubt whether a proposal is within the competitive range, that doubt shall be resolved by including it.

Further, GAO has recognized that determining the competitive range is a function of the contracting agency and that contracting officers have a broad range of discretion in this area. 47 Comp. Gen. 29 (1967); 49 id. 309 (1969). However, it is generally not proper for the contracting officer to construct the competitive range solely on the basis of predetermined cutoff scores without regard to the numerical scores actually achieved by the proposals in the technical evaluation. 52 Comp. Gen. 718 (1973); 50 id. 59 (1970); PRC Computer Center, Inc., et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35.

Inclusion of a proposal within the competitive range does not constitute an admission by the agency that the proposal is acceptable, but merely indicates the proposal can be improved without major revisions to the point where it becomes acceptable. Proprietary Computer Systems, Inc., 57 Comp. Gen. 800 (1978), 78-2 CPD 212. However, once an offer is found to be within the competitive range, it may not thereafter be excluded from further consideration unless (a) there has been a meaningful opportunity to submit a revised proposal, or (b) the only reason for inclusion in the competitive range was because of a favorable interpretation given to a material ambiguity or omission, and it later develops as the result of discussions that the offeror should not have been included in the competitive range in the first place. Operations Research, Incorporated, 53 Comp. Gen. 593 (1974), 74-1 CPD 70, modified by 53 Comp. Gen. 860, 74-1 CPD 252.

Conducting negotiations

There are restrictions on the information the contracting officer or negotiator may reveal to offerors in the course of negotiations. DAR 3-507.2 provides that after receipt of initial proposals no information contained in any proposal or information regarding number or identity of offerors shall be made available. Subparagraph (b) of the same regulation states contracting personnel shall not furnish information to a potential supplier which may afford him an advantage over others. When it is necessary to rectify deficiencies in the RFP, an appropriate amendment should be furnished all offerors in a timely manner and they should be permitted an opportunity to make revisions in light of the FPR amendment. By the same token, where it becomes apparent that the Government's needs may be better fulfilled in a manner other than that specified in the RFP, all offerors should be appropriately advised in writing by an amendment, and further discussion or negotiation should follow. 48 Comp. Gen. 583 (1969); 49 Comp. Gen. 156 (1969); DAR 3-805.4. Auction techniques, such as advising offerors of their price relationship with others, are prohibited. DAR 3-805.3(c). Although an offeror may be advised that the Government considers his price too high, he may not be told how it stands in relation to other proposals. But if the Government inadvertently discloses one offeror's pricing information to another, equalizing the competition may require conditioning the privileged offeror's continued participation in the procurement on its willingness to have its pricing information disclosed. T M Systems, Inc., 55 Comp. Gen. 1066 (1976), 76-1 CPD 299.

What to discuss usually depends upon the particular circumstances involved. FPR 1-3.805-1(a) provides that the Government must afford all selected offerors "an equitable opportunity to submit such price, technical, or other revisions in their proposals as may result from the negotiations." See also DAR 3-805.3(a). The rule that discussions must be "meaningful" is well established. As a general principle, negotiations should include identification of deficiencies or ambiguities in the offer with an opportunity for the offeror to respond to the points raised by the Government. 52 Comp. Gen. 409 (1973); 52 id. 466 (1973). However, this principle should not be extended to the point that "technical transfusion" occurs; that is, there should not be a disclosure to an offeror of a competitor's innovative solution to a problem. 52 Comp. Gen. 870 (1973); Raytheon Company, 54 Comp. Gen. 169 (1974), 74-2 CPD 137.

Restrictions on discussions have also been recognized in special procedures used by the National Aeronautics and Space Administration for cost-type contracts and by DOD for research and development procurements ("Four-step" source selection procedure, DAR 4-107). Both the NASA and DOD procedures are similar in that discussions with offerors are normally limited to clarifications, and do not include discussion of deficiencies. After the discussions phase and revisions to the proposals, a prospective contractor is selected. The definitive contract is then negotiated only with that offeror. For an extensive description of the NASA and DOD procedures, see GTE Sylvania, Inc., 57 Comp. Gen. 715 (1977), 77-2 CPD 422.

Closing negotiations

DAR provides (3-805.3(d)) that at the conclusion of discussions a final, common cut-off date shall be established and all remaining participants so notified. The notification must include these elements: (a) discussions have been concluded; (b) offerors are being given an opportunity to submit a written "best and final" offer; and (c) if any such modification is submitted it must be received by the date and time specified, and is subject to the "Late Proposals and Modifications of Proposals" provision of the solicitation. FPR 1-3.805-1(b) is similar to an earlier version of DAR. FPR states that while negotiations with offerors may be conducted successively, all such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that revisions to proposals should be submitted by that date. The current DAR version is synthesized from a large number of Comptroller General decisions on protests concerning the manner in which negotiations were concluded. See, for example, 48 Comp. Gen. 536 (1969).

The basis for a requirement of a common cut-off of negotiations with all offerors in the competitive range is to prevent the possibility that an offeror submitting a later proposal revision may have an unfair advantage over his competitors. 50 Comp. Gen. 1 (1970). After best and final offers have been received, the Government may reopen negotiations (48 Comp. Gen. 536 (1969)), provided that it is clearly in the best interest of the Government to do so. ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301. Indiscriminate reopening of negotiations tends to undermine the effectiveness and integrity of the competitive procurement process. B-176283, February 5, 1973. Reopening is proper where the only

two competitive offers contain unacceptable provisions, or where there is material change in the Government's needs after closing of discussions. Teledyne Ryan Aeronautical, B-180448, April 29, 1974, 74-1 CPD 219; Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168. A second round of best and final offers is required where further discussions are held with one offeror after the cut-off date; what constitutes "additional discussions" depends on whether the offeror has been afforded a further opportunity to revise his proposal. 51 Comp. Gen. 479 (1972). Discussions do not occur when the low offeror is asked to furnish information relating to responsibility, or when Government officials visit the offeror's plant to verify factual representations in the offeror's proposal. Radiation Systems, Incorporated, B-180268, July 29, 1974, 74-2 CPD 65; 52 Comp. Gen. 358 (1972). But, when the Government accepts an offeror's proposed price increase in exchange for an extension of its offer, discussions have occurred and all competitive offerors must be given a further opportunity to revise their proposals, with a second common cut-off date. Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 201 (1975), 75-2 CPD 144.

Evaluation and selection

It is fundamental that the evaluation of proposals is the function of the contracting agencies. GAO has repeatedly stated that its function in deciding protests is not to conduct de novo evaluations of proposals, but rather to apply a standard of review to contracting agencies' evaluations. This standard has often been expressed as whether the agency' evaluation results have been clearly shown to have no reasonable basis. See generally Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458 and decisions cited therein.

In a negotiated procurement, certain cost/technical tradeoffs may be made. The extent to which one may be sacrificed for the other is ruled by the evaluation scheme and the weight accorded each factor. As noted above, the RFP must inform offerors of the evaluation factors and the relative importance to be attached to each. 51 Comp. Gen. 272 (1971); Automated Systems Corporation, B-184835, February 23, 1976, 76-1 CPD 124. The Comptroller General has said that "Competition is hardly served if offerors are

347. Also, the selection decision's consistency with the evaluation factors will be considered by GAO in determining whether the selection official's exercise of judgment and discretion is subject to objection. EPSCO, Incorporated, B-183816, November 21, 1975, 75-2 CPD 338. But where an agency reasonably determines that two competing proposals are essentially equal technically, price or cost properly becomes the determining factor in making the award. 50 Comp. Gen. 246 (1970); Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325.

SECTION IV--Price Negotiation

A fundamental concept of Government procurement is that competition assures a fair and reasonable price. However, where negotiation is authorized, certain restrictions upon the competitive process are usually present. To compensate for these inherent restrictions on competition, the procurement agencies have developed guidelines for use by contracting officers in determining whether a negotiated proposal is fair and reasonable. Therefore, DAR 3-807.1(d) requires some form of price or cost analysis in connection with every negotiated procurement action. FPR 1-3.807-2(a) states that such analysis "should" be made in connection with each negotiated procurement. Under both DAR and FPR, the method and degree of such analysis depends upon the particular circumstances.

Price analysis

Price analysis is performed in all cases where cost or pricing data is not required. (See later discussion in this section.) Price analysis is defined in the regulations as the process of examining and evaluating a prospective price without evaluation of the separate cost elements or proposed profit of the prospective supplier. Price analysis may be performed by comparing the submitted price quotations with each other, with prior quotations and contract prices for the same or similar items, with published competitive price lists or published market prices, with independent Government estimates, or with rough mathematical pricing formulas, such as dollars per pound or per horsepower.

Cost analysis

A cost analysis involves a more detailed review of the offeror's proposal and is used where the Government has less assurance of a fair and reasonable price. Presently, cost analysis is defined in DAR 3-807.1(a)(3) as follows:

"Cost analysis is the review and evaluation of a contractor's cost or pricing data and of the judgmental factors applied in projecting from the data to the estimated costs, in order to form an opinion on the degree to which the contractor's proposed costs represent what performance of the contract should cost, assuming reasonable economy and efficiency."

DAR 807.2(b)(1) further provides that cost analysis include the appropriate verification of cost or pricing data, the evaluation of specific elements of costs and the projection of these data to determine the effect on prices of such factors as:

"(i) the necessity for certain costs,

"(ii) the reasonableness of amounts estimated for the necessary costs,

"(iii) allowances for contingencies,

"(iv) the basis used for allocation of indirect costs; and

"(v) the appropriateness of allocations of particular indirect costs to the proposed contract.

"(2) Cost analysis also shall include appropriate verification that the contractor's cost submissions are in accordance with Section XV, Contract Cost Principles and Procedures * * *. [These principles include applicable standards of cost allowability promulgated by the Cost Accounting Standards Board; the statute creating this Board designated the Comptroller General as Chairman.]

"(3) Among the evaluations that should be made, where the necessary data are available, are comparisons of a contractor's or offeror's current estimated costs with:

"(i) actual costs previously incurred by the contractor or offeror;

"(ii) either his last prior cost estimate or a series of prior estimates for the same or similar items;

"(iii) current cost estimates from other possible sources;

"(iv) prior estimates or historical costs of other contractors manufacturing the same or similar items; and

"(v) forecasts or planned expenditures.

"(4) Forecasting future trends in costs from historical cost experience is of importance, but care must be taken to assure that the effect of past inefficient or uneconomical practices are not projected into the future. An adequate cost analysis must include an evaluation of trends and changes in circumstances, if any, and their effect on future costs."

Cost or pricing data

In 1962, as a result of concern over excessive profits of defense contractors and in order to improve the Government's chances of obtaining fair and reasonable prices in negotiated procurements, Congress enacted Public Law 87-653, commonly referred to as the Truth in Negotiations Act. The principal effect of that act was to require "cost or pricing data" to be furnished by prospective contractors prior to agreement upon contract prices. Now codified at 10 U.S.C. 2306(f), the act requires contractors to furnish "accurate, complete, and current" data, to certify that the data furnished met those requirements, and to agree to a contract provision giving the Government the right to unilaterally reduce the price by any amount it was increased as a result of defective cost or pricing data. The truth in negotiations law applies only to military procurements, but the provisions have been applied to civilian procurements by regulation. FPR 1-3.807, et seq.

DAR 3-807.3 and FPR 1-3.807-3 set forth in detail when the submission of cost or pricing data is required. Cost or pricing data is required to be obtained for all negotiated contracts expected to exceed $100,000 in amount, and for contract modifications over $100,000 to any contract, whether or not cost or pricing data was required initially. In addition to furnishing data the prime contractor is required to secure cost or pricing data from subcontractors if the price of such subcontract is expected to exceed $100,000. Each tier subcontractor is required to submit such data if its subcontract exceeds $100,000 and the next higher tier and the prime contractor were required to furnish data.

There are three major exceptions to the requirement for data. First, data is not required where the price negotiated is based on adequate price competition. Adequate price competition is defined in DAR 3-807.7(a)(b)(c) and FPR 1-3.807-1(b)(1). This exception applies even where a fixed-price incentive contract is involved. Serv-Air, Inc. - Reconsideration, 58 Comp. Gen. 362 (1979), 79-1 CPD 212. Second, data should not be requested if the negotiated price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public. The guidelines for application of this exception are in DAR 3-807.3(b) and FPR 1-3.807-1(b)(2). These two exceptions are the situations in which only a price analysis, not a cost analysis will normally be made. The second exception is discretionary, however, and a contracting officer may require cost data even where it is applicable. Sperry Flight Systems, ASBCA 17375, 74-1 BCA 10648; Sperry Flight Systems Div. of Sperry Rand Corp. v. United States, 212 Ct. Cl. 329 (1977).

The third exception to the requirement for cost or pricing data is for a negotiated price which is based on prices set by law or regulation. In addition, the head of the procuring agency may waive the requirement for cost or pricing data in exceptional cases.

Equally important is the question of what constitutes cost or pricing data. Cost or pricing data refers to that portion of the contractor's submission which is factual. It includes all facts reasonably available to the contractor up to the time of agreement which might reasonably be expected to have a significant effect on the price negotiation. DAR 3-807.1(a)(1). "In short, cost or pricing data consists of all facts which can reasonably be expected to contribute to sound estimates of future costs as well as the validity of costs already incurred. Cost or pricing data, being factual, are that type of information which can be verified." DAR 3-807.1(a)(1). The facts upon which a prospective contractor bases his judgment constitute data; however, the judgment itself is not part of cost or pricing data.

The Truth in Negotiations Act, particularly the cost or pricing data provisions, has generated much controversy and litigation. A substantial body of case law has now been accumulated in the interpretations of the act by boards of contract appeals and by the Court of Claims. Of particular importance are the decisions relating to what constitutes data and those dealing with what the Government must prove in order to be entitled to recovery or setoff.

Price reductions have been upheld for failure to disclose lower vendor quotes even though the contract price was not negotiated on the basis of those quotes. Cutler-Hammer, Inc., ASBCA 10900, 67-2 BCA II 6432; Spartan Corporation, ASBCA 11363, 67-2 BCA II 6539. The Court of Claims, in the first judicial opinion respecting cost or pricing data, ruled that the contractor may set off understatements in the contract price resulting from defective data against the price reduction sought by the Government for overstatements due to other defective cost or pricing data Cutler-Hammer Inc. v. United States, 189 Ct. Cl. 76 (1969). The court limited this relief only to the extent of the price reduction sought by the Government and expressly stated that an increase in the contract price may not be obtained for defective cost or pricing data. It has been held that neither unacceptable subcontractor quotations received prior to the certification nor subcontractor quotations received after the certification but prior to contract award are required to be disclosed to the Government. Paceco, Inc., ASBCA 16458, 73-2 BCA 10119. The facts which are required to be disclosed and certified must be those in the contractor's possession or reasonably available; if the data was not reasonably available to the contractor's negotiators, a defective pricing adjustment cannot be supported. LTV Electrosystems, Inc., Memcor Division, ASBCA 16802, 73-1 BCA 9957. The submission must specifically identify the contractor's cost data; merely making available contractor books, records and other documents does not constitute "submission." M-R-S Manufacturing Company v. United States, 203 Ct. Cl. 551, 492 F.2d 835 (1974). Finally, the Court of Claims has held that in determining whether data items not disclosed by a contractor were significant in terms of their effect on the final negotiated contract price, the items should be viewed cumulatively rather than individually. Sylvania Electric Products, Inc. v. United States, 479 F.2d 1342 (Ct. Cl. 1973).

These brief references illustrate a few highlights of a complex area of Federal procurement.

SECTION V--Types of Contracts

Principally, the Government employs two types of contracts, fixed-price and cost-reimbursement. However, several variations of these two types of contracts have been developed over the years.

In advertised procurements some form of a firm fixed-price type contract is used since the specifications are definite and competition is present. The Government may also award a fixed-price contract with economic price adjustment or escalation clauses in certain circumstances. See DAR 2-104; FPR 1-2.104-1. In negotiated procurements, the contract type, while selected by the Government, is subject to negotiation and may be changed to facilitate price negotiation. The firm fixed-price or lump-sum contract type places the greatest risk of performance on the contractor. The cost-plus-a-fixed-fee type contract, at the other extreme, places the cost or maximum performance risk on the Government with the contractor receiving a guaranteed fee.

Before discussing briefly the variations of contract type, a major point to be noted is that cost-plus-a-percentage-of-cost contracts are prohibited under the two principal procurement statutes. 10 U.S.C. 2306; 41 U.S.C. 254(b). Thus the statutes prohibit a system of contracting whereby a contractor may increase his fee by increasing the Government's cost.

Firm fixed-price

This contract type is characterized by a lump-sum price not subject to adjustment. (The adjustment referred to does not include contract modifications or change orders.) The risk of performance falls on the contractor. This type of contract should be used where competition is present and detailed specifications are available. See DAR 3-404.2; FPR 1-3.404-2.

Fixed-price with escalation

This contract type is characterized by a lump-sum price subject to upward or downward adjustment upon the occurrence of contingencies specified in the contract. These contingencies are matters beyond the parties' control such as labor rates or market price indices. See DAR 3-404.3; FPR 1-3.404-3.

Fixed-price incentive

This type of lump-sum contract is characterized by an adjustment formula in the contract which relates to the efficiency of the contractor. A target profit and target cost are negotiated, along with a profit formula. The contractor's profit increases or decreases according to the formula as the actual costs are less or more, respectively, than the target cost. The fixed-price incentive contract is distinguished from the cost incentive contract by the

inclusion of a ceiling price. Costs in excess of the ceiling price are borne entirely by the contractor. See DAR 3-404.4; FPR 1-3.404-4.

Fixed-price with price redetermination

This is essentially a lump-sum contract with adjustments within specified limits negotiated as actual costs become known. As in fixed-price escalation contracts, the Government assumes the risk of contingencies which may occur. The price redetermination may be made either at specified times during performance or after completion of performance. This type of contract should be used in limited instances only. See DAR 3-404.5 and 3-404.6; FPR 1-3.404-5 and 1-3.404-7.

Firm fixed-price level of effort term

The contract describes the required work in general terms, usually an investigation or study in the research and development area. The contractor must devote a specified level of effort for a stated period of time for a fixed dollar amount. Use of this type of contract is also limited. See DAR 3-404.7.

Cost contract

The contractor is reimbursed for costs only and receives no fee. This type of contract is used for facilities contracts and research and development contracts with nonprofit organizations. DAR 3-405.2; FPR 1-3.405-2.

Cost-sharing contract

The contractor receives no fee and is reimbursed for only a portion of his costs. This type of contract is used where the benefits of a research and development contract accrue to both parties. DAR 3-405.3; FPR 1-3.405-3.

Cost-plus-incentive-fee

This type of contract is similar to the fixed-price incentive contract, discussed above, except there is no ceiling price. There is a target cost, target fee, a minimum and a maximum fee, and a fee adjustment formula. The variation in fee depends upon the extent to which total allowable costs exceed or are less than target costs. This provides the contractor an incentive to manage the contract effectively. DAR 3-405.4; FPR 1-3.405-4.

Cost-plus-award-fee

This type of contract involves a target cost, a fixed base fee and evaluation criteria to assess the contractor's performance in areas such as quality, timeliness, ingenuity, and cost effectiveness. If the contractor's performance meets the stipulated criteria, an adjustment is added to the base fee up to a specified maximum limit. The Government's subjective evaluation of the contractor's performance is not appealable under the disputes clause of the contract. See DAR 3-405.5; FPR does not specifically provide for this type of contract.

Cost-plus-a-fixed-fee

The contractor receives a set fee and is reimbursed for all costs allowable under established cost principles. DAR, XV, FPR 1-15. The fees allowable are limited by statute, 10 U.S.C. 2306(d); 41 U.S.C. 254(b). This type should not be used for a major weapons system. See DAR 3-405.6; FPR 1-3.405-5.

Time-and-materials/labor-hour

These are contracts providing for supplies or services on the basis of direct-labor hours at specified fixed hourly rates and materials at cost. DAR 3-406.1; FPR 1-3.406-1.

The above are the major types of contracts. In addition, there are requirements contracts, indefinite and definite quantity contracts, letter contracts, and informal commitments. A full discussion of these types and their proper use is contained in the regulations, DAR 3-401, et seq. and FPR 1-3.400, et seq.

SECTION VI--Contract Audits

Audits of Government contracts are performed for different purposes by two separate agencies. First, the contracting agency performs audits to assure the contract is being performed according to its terms and any legal requirements, and to determine the propriety of contract payments. Second, the General Accounting Office performs independent audits for the purpose of ascertaining whether Government agencies are making procurements in the most efficient, economical, and effective manner, and to advise Congress

of GAO's recommendations for administrative or legislative actions needed to improve agency contracting practices and procedures. In addition, the GAO may make reviews of individual contracts to determine whether excessive and unreasonable payments have been made to contractors. However, judicious use of manpower resources dictates that reviews of the latter type be made sparingly.

In view of these two distinct audits we will discuss them separately.

Agency audits

Agency audits are based normally upon the authority of a clause contained in the contract. However, there is also statutory authority for these audits in many instances. 10 U.S.C. 2313(a) and 41 U.S.C 254(b) provide for audits by the procurement activity of any cost or cost-plus-a-fixed-fee contract made by that agency. This authority extends to subcontracts under those prime contracts.

Authority to audit other forms of contracts formerly was obtained solely through contract clauses. The regulations usually require the inclusion in contracts other than those which are awarded for less than $100,000 or under formal advertisement, of a clause similar in form to that set out in DAR 7-104.41. The military agencies have the statutory right to audit the books and records of contractors and subcontractors for the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted under 10 U.S.C. 2306(f). See Public Law 90-512, September 25, 1968, 82 Stat. 863.

General Accounting Office audits

Audits by the GAO are primarily a review after contract performance for the purpose of informing Congress of the manner in which the procurement activity is administering appropriated funds. The authority of the GAO to conduct these audits in negotiated contracts is statutory. 10 U.S.C. 2313(b), 41 U.S.C. 254(c). Both the military and civilian procurement regulations require the insertion of the Comptroller General's audit right, known as examination of records, in all negotiated contracts exceeding $10,000. DAR 7-104.15; FPR 1-7.103-3; 1-7.202-7; 1-7.302-6; 1-7.402-7; 1-7.602-7; 1-7.703-7. The Comptroller General's right to

examine records extends to first tier subcontractors and covers all records that directly pertain to the subject matter of the contract whether or not actually used in the negotiation of the contract. Hewlett Packard Co. v. United States, 385 F.2d 1013 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968).

Subsequent to Hewlett Packard, a series of cases have dealt with the scope of GAO access to drug company records of indirect, unallocated costs such as research and development, promotion, marketing, distribution and administration. In Eli Lilly & Co. v. Staats, 574 F.2d 904 (7th Cir. 1978), cert. denied, 99 S. Ct. 362 (1978), the court ruled that under the access to records clause GAO is entitled to examine records relating to direct manufacturing costs, overhead items such as manufacturing overhead, research and development, marketing, and general and administrative costs, as well as records which relate directly to the establishment of the contract price. GAO may examine those records even when a company's accounting system does not allocate them to individual products or contracts and even when a company bases its contract price on its standard commercial catalog price. The Lilly case was later followed in United States v. Abbott Laboratories, 597 F.2d 672 (7th Cir. 1979). On the other hand, Bristol Laboratories Division of Bristol-Myers Co. v. Staats, 428 F. Supp. 1388 (S.D.N.Y. 1977) held that GAO was not entitled to access to such records, and this decision was affirmed by the Second Circuit Court of Appeals in 1980, thus creating a split in the circuits. It should be noted also that unallocated overhead items are limited to industries, such as the pharmaceutical industry, in which such costs constitute a large portion of the total cost of supplying the item.

The GAO statutory audit authority covers only negotiated contracts and any right to examine contract price adjustments to advertised contracts is by virtue of a contract clause included by the contracting officer such as in DAR 7-104.41.

CHAPTER 5

PROCUREMENT POLICIES

In addition to the policy of seeking the greatest possible degree of competition in Government procurement, Congress has also enacted several statutes which reflect other policy considerations. Some have to do with efficiency, economy, and fairness of the contracting process, while others attempt to achieve certain social and economic goals through the procurement mechanism. The policies in the former category are generally expressed as prohibitions, and will be briefly set out in this section. The latter policies will be discussed separately in the later sections, and generally provide for favored treatment of certain potential contractors.

Transfer or assignment of contracts

The Assignment of Claims Act of 1940, now codified in 41 U.S.C. 15 and 31 U.S.C. 203, prohibits the transfer or assignment of Government contracts. This statute insures the Government the benefit of performance by the party with whom it contracts and upon notice of a transfer to have the election of repudiation or recognition of the transferred contract. This statute is generally raised in contracts involving special financial considerations and permits certain assignments to financing institutions of moneys due under contracts. However, the Government retains its right to set off the debts of the contractor against the sum due the assignee financing institution, except that contracts during war or national emergency may specifically preclude setoff against the assignee.

Contingent fees

Government contracts contain a clause requiring the contractor to warrant that he has not retained on a contingent fee basis any person or agency to obtain the contract, except a bona fide employee or established agency maintained by him to obtain business. This clause is required in advertised contracts by regulation and is required by statute in negotiated contracts. DAR 1-502, 503; FPR 1-1.501; 10 U.S.C. 2306(b); 41 U.S.C. 254(a). The exceptions cover parties maintained on a continuing basis such as sales directors. In the event a contractor breaks his warranty the Government may annul the contract without liability or recover the amount of the fee such as by deducting it from contract price.

Officials not to benefit

18 U.S.C. 431 prohibits a Member of Congress from benefiting from a Government contract. This statute provides criminal sanctions and declares void contracts in violation of this prohibition. The statute does not cover contracts made with a corporation for its general benefit, but does cover partnerships. 18 U.S.C. 433; 4 Op. Atty. Gen. 47 (1842). Furthermore, 41 U.S.C. 22 directs that every Federal contract, except for some relating to farming operations, shall include an express condition that no Member of Congress shall be permitted to share in or benefit from the contract.

Gratuities

10 U.S.C. 2207 requires that all contracts, except those for personal services, involving Department of Defense appropriations contain a clause providing the Government may terminate the contractor's right to proceed, with the Government entitled to exact default damages and a penalty, if, after notice and hearing, it is found gratuities were offered an employee of Government with a view to securing a contract. In addition, the bribery statute (18 U.S.C. 201) would apply to the giving or offering anything of value to a public official "to influence any official act," including the award of a contract.

Anti-kickback statutes

41 U.S.C. 51 prohibits the payment of any fee or gratuity by a subcontractor to a prime contractor or higher tier subcontractor as an inducement for award of a subcontract. This statute applies to negotiated contracts and provides for criminal penalties and recovery by the Government of the amount of the fee.

Violation of antitrust laws

10 U.S.C. 2305(d) and 41 U.S.C. 252(d) require procuring agencies to refer advertised bids which evidence antitrust violations to the Attorney General. Similar requirements are imposed in negotiated procurements by regulation, DAR 1-111.2; FPR 1-1.901(b).

Conflicts of interest

This area deals with those situations where an employee of the Government due to financial interest, former employment or bribery may not properly deal with a contractor. Various criminal statutes cover these situations. For example, see 18 U.S.C. 205 and 207. In addition to these individual conflicts of interest laws, the Department of Defense and NASA have developed regulations dealing with organizational conflicts of interest which in essence forbid companies having an unfair advantage because of one contract from competing for another. DAR, Appendix G; NASA PR, Appendix G.

Selling to the United States

For a period of three years after retirement, appropriated funds may not be paid to any retired regular officer who is engaged or employed in contracting activities involving certain agencies. 37 U.S.C. 801(c).

This list of prohibitory statutes is intended to be illustrative, not exhaustive.

SECTION II--Buy American

The procurement of domestic products has been preferred as a matter of congressional policy in appropriation acts since the 19th century. 18 Stat. 455. Annual DOD appropriation acts still commonly bar the use of funds for purchase of certain foreign items. See DAR 6-300.

The Buy American Act, 41 U.S.C. 10a-10d, enacted as permanent legislation in 1933, imposes restrictions on the procurement of foreign supplies and construction materials. The act requires the procurement of domestic raw materials and supplies, or domestic manufactured materials and supplies, manufactured from domestic raw materials unless the head of the department determines domestic procurement to be inconsistent with public interest or the cost to be unreasonable. Exceptions to the statutory requirement are established for articles procured for use outside of the United States, and for raw materials or manufactured articles which are not available domestically in sufficient or reasonable commerical quantities and of a satisfactory quality.

The Buy American Act as implemented and interpreted by Executive Order 10582 provides standards for preferential treatment of domestic supplies, not total exclusion of foreign products. The Executive Order contains two key statements of policy. First, under section 2(a) material is foreign if the cost of the foreign products ("components") used constitutes 50 percent or more of the cost of the product. Second, section 2(c)(1) establishes 6 percent as the normal evaluation factor to be added to bids offering foreign products. This means that for the purpose of bid evaluation, not award, an amount equal to 6 percent of the foreign product bid will be added to that bid. This evaluation factor may be increased by the procuring agencies to 12 percent where the low domestic bid was submitted by a small business or labor surplus concern.

A large number of GAO bid protest cases involve the application of the act and implementing regulations to specific procurement situations. Many of these involve the distinction between an end-product and a component. In addition, it should be noted that DAR provides for special consideration of Canadian supplies and components. Furthermore, both DAR and FPR have made temporary provision for the application of a 50 percent evaluation factor to foreign bids as a countermeasure to the U.S. balance of payments deficit. In view of the complexity of the subject matter, no attempt is made to summarize the issues any further. Specific questions should be addressed by close attention to DAR Section VI ("Foreign Purchases") and FPR Part 1-6 ("Foreign Purchases").

The important matter to keep in mind is that once the appropriate determinations and evaluation factors are made, the Buy American Act does not provide authority to disregard the low responsive bid. 42 Comp. Gen. 608 (1963).

SECTION III--Equal Employment Opportunity

This social policy which has been the subject of many laws and judicial decisions has been required in Government contracts principally by a series of Executive Orders, currently 11246, as amended. That order delegates to the Secretary of Labor the overall responsibility for administering this policy. This is carried out by the Office of Federal Contract Compliance. See 41 CFR, chapter 60. However, Executive Order 11246 assigns to the contracting agencies the responsibility for seeing those policies are complied with by the contractors.

This is accomplished for the main part through the inclusion of a mandatory clause prescribed by the Executive Order. That clause forbids discriminatory hiring practices and requires the contractor to undertake affirmative action to recruit employees without regard to race, color, religion, sex, or national origin. By requiring affirmative action prior to award and withholding contract award pending compliance the procurement agencies have endeavored to enforce the policies set out by the Secretary of Labor. To date, contract cancellation or debarment for failure to comply has been infrequently invoked. However, extensive informal efforts are made to secure voluntary compliance.

The legality of this social policy in Government contracts was judicially established by the Third Circuit Court of Appeals, rejecting two prior GAO opinions, in Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (1971), when it held the affirmative action plan legal and ruled it did not establish goals as prohibited by the Civil Rights Act of 1964 since only a good faith effort by the contractor was required, not the actually hiring of a specified quota of minority employees.

SECTION IV--Small Business

Possibly the most extensive and complex social policy in Government procurement is that favoring small business. The Small Business Act of 1953, 15 U.S.C. 631, states it is the policy of Congress that a fair proportion of Government procurement be placed with small business concerns. The Small Business Administration (SBA) created by that act assists small business in various ways and has issued exhaustive regulations. 13 CFR, part 101 et seq. See also DAR, section 1, part 7; FPR, subpart 1-1.7. For the purposes of Government procurement the SBA is empowered to carry out five principal functions: (1) to make a more detailed definition of a small business concern; (2) to determine the small business status of individual concerns; (3) to make joint determinations with procuring activities that a procurement or portion thereof should be set aside for small business concerns; (4) to certify as to all elements of responsibility of small business concerns; and (5) to enter into contracts with the United States and to arrange for performance of those contracts through subcontracts with small business concerns.

Size standards

The SBA performs two interrelated functions insofar as small business size standards are concerned. It is empowered by the Small Business Act to further define for procurements what constitutes a small business concern and upon request may certify that a particular concern is a small business. 15 U.S.C. 632; 15 U.S.C. 637(b)(6).

In performing the first of these functions the SBA has expanded the general definition of small business concerns as follows:

> "A small business concern for the purpose of Government procurement is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is bidding on Government contracts and * * *has 500 employees or less." 13 CFR 121.3-8.

In addition to this general definition the SBA has set out other standards for particular types of businesses, such as construction, research and development, transportation, manufacturing, and services. Detailed definitions of small business concerns for particular procurements have been established by SBA regulations which have the force and effect of law. Otis Steel Products Corporation v. United States. 161 Ct. Cl. 694, 699 (1963).

Eligibility for award of a Government contract as a small business concern is established by a procedure known as self certification, whereby an offeror certifies in his offer that he believes in good faith that he qualifies under the applicable size standards as a small business for that procurement. In the absence of a written protest from another bidder filed with the contracting officer in a timely fashion as specified in 13 CFR 121.3-5, or a question by the contracting officer himself, such concern is deemed to be a small business for the purpose of the particular procurement. In other words, the self certification is usually to be accepted at face value. When the self certification of an offeror is timely protested the matter is referred to the SBA for resolution. The size determination by SBA is conclusive upon the contracting officer and the Comptroller General. 38 Comp. Gen. 328 (1958), 41 id. 649 (1962).

As a matter of policy, SBA requires that to be eligible for award of small business set-asides, a firm must be a small business both at the time for submission of bids or initial proposals and at the time of award. Where SBA determines a firm was large at the time of submission of initial proposals GAO will not review the question whether the offeror self-certified in good faith, even though the firm might be small as of the date of award and might have self-certified in good faith when it submitted its initial proposal. CADCOM, Inc., 57 Comp. Gen. 290 (1978), 78-1 CPD 137.

The SBA has established size appeals boards to consider appeals from size determinations; however, contract award need not be withheld pending such an appeal.

Small business set-asides

The SBA regulations and those of the procuring agencies, in implementing the policy of Congress of assuring a fair proportion of contracts for small business, provide for total or partial set-asides at the discretion of the procuring agency unilaterally or in consultation with SBA. DAR 1-706; FPR 1-1.706. When the decision is made to have a partial set-aside for small business, bids are solicited from all concerns and award is made for the non-set-aside portion; then negotiations are conducted with small business concerns, in accordance with an order of preference set forth in the regulations, who have submitted bids on non-set-aside portion within 130 percent of award price. The actual award price for the set-aside may not exceed the award price for the non-set-aside portion.

A total set-aside for small business is conducted as though the procurement were advertised; however, the procurement is restricted solely to small business on the basis of negotiation authority. The procurement agency in determining to set-aside a procurement exclusively for small business need have only a reasonable expectation that a sufficient number of bids will be received so that award will be made at reasonable price. The Comptroller General has ruled that the existence of a lower price from large business or increased procurement costs does not invalidate the determination to set-aside the procurement. 43 Comp. Gen. 497 (1963). In view of the administrative discretion involved, the Comptroller General will review but will rarely question whether a given set-aside violates the "fair proportion" standard.

Certificates of competency

Prior to Public Law 95-89, August 4, 1977, the Small Business Act empowered SBA to conclusively certify that a small business had the "capacity and credit" to perform a specific contract (15 U.S.C. 637(b)(7)). The then-applicable procurement regulations required contracting officers to refer the question of a small business's responsibility to SBA for possible issuance of a Certificate of Competency (COC) only where the procurement was in excess of $10,000, the small business's bid was otherwise acceptable and award was not being made to the small business because it had been found nonresponsible as to capacity or credit. Further, COC referral was not mandatory where a properly documented certificate of urgency was executed. Also, COC's were conclusive only as to matters of capacity or credit--not matters relating to a small business's integrity, tenacity or perseverance. 43 Comp. Gen. 257 (1963).

Section 501 of Public Law 95-89, 91 Stat. 561, amended 15 U.S.C. 637(b)(7) to provide that SBA is empowered to conclusively certify " * * * with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity * * *." It further provided that a small business could not, for any of these reasons, be precluded from obtaining an award without referral of the matter to SBA for a final disposition, and did not state any exceptions to the referral procedure.

Thus, in addition to expanding the scope of COC's beyond capacity and credit, Public Law 95-89 in effect ended exceptions to COC referral based on urgency or the dollar amount of the procurement. See Hatcher Waste Disposal, 58 Comp. Gen. 316 (1979), 79-1 CPD 157; The Forestry Account, B-193089, January 30, 1979, 79-1 CPD 68. Also, since SBA is empowered to conclusively determine all areas of responsibility with respect to small businesses, the possibilities of GAO review concerning the issuance of COC's are extremely limited, and essentially turn on a protester making a showing of fraud or a wilful disregard of vital information by SBA in reaching its COC determination. See generally J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322.

Small business subcontracting

Subcontracts with small business concerns may be made by either the prime contractor or the SBA. 15 U.S.C. 637 (a)(1) authorizes the SBA to enter into a direct contract with any procuring agency and to subsequently subcontract work to small business concerns. Of more practical importance, however, are the provisions encouraging prime contractors to let subcontracts to small businesses.

In 1961 because the complexity of Government procurements was decreasing the small business share, Congress amended the Small Business Act to require a subcontracting program be developed by SBA, the Defense Department and the General Services Administration. As a result a contract clause was required to be included in most contracts over $1,000,000 and most subcontracts over $500,000 requiring: that the prime contractor establish a program to assure that small contractors are solicited for all subcontract opportunities; that records be maintained; and that regular reports be submitted to the contracting officer. 15 U.S.C. 637(d)(1) and (2). A further significant development was Public Law 95-507, October 24, 1978, 92 Stat. 1757. Among other things, this law amended 15 U.S.C. 637(d) to require that apparently successful offerors or apparent low bidders for construction contracts over $1,000,000 and other contract over $500,000 submit, before award, subcontracting plans setting forth percentage goals for utilization as subcontractors of small business concerns and small business concerns owned or controlled by socially and economically disadvantaged individuals.

SECTION V--Labor Policies

Over a period of many years, the Congress by statute and the Executive Department through regulations, executive orders, and contract clauses, have prescribed various labor standards and have provided for preferential treatment for labor surplus area businesses seeking Government procurements. Only the principal statutes and their primary provisions are mentioned here.

Labor surplus areas

Pursuant to Defense Manpower Policy No. 4A (32A CFR, part 134) the placement of contracts or performance of contracts in areas of unemployment or underemployment is encouraged. While the Department of Labor is responsible for determining the areas to be favored, the procurement agencies have the responsibility for administering the policy by means of contract clauses. Historically this program took a form similar to small business set-asides, previously discussed, except that only part of each procurement was set aside. Prior to Public Law 95-89, August 4, 1977, the procurement regulations permitted partial set-asides exceeding 50 percent of the total requirement conditioned upon a determination that there was a reasonable expectation that the action would not result in the payment of a price differential.

Section 502(d), (e) of Public Law 95-89 amended the Small Business Act to set forth an order of precedence for procurement set-asides, with first priority for total labor surplus area set-asides. However, in The Maybank Amendment, 57 Comp. Gen. 34, 77-2 CPD 333, GAO held that where a subsequent Department of Defense appropriations act prohibited the payment of contract price differentials for relieving economic dislocation, the DOD prohibition was required to be given effect notwithstanding that Public Law 95-89 allowed payment of such differentials.

The Walsh-Healey Public Contracts Act, 41 U.S.C. 35

This act requires by contract clause that contractors for supplies in excess of $10,000: (1) Be a manufacturer of or regular dealer in those supplies; (2) Pay the prevailing minimum wages; (3) Not work his employees in excess of the maximum daily or weekly hours; (4) Observe certain minimum ages for employment; and (5) Not permit performance of the contract under unsanitary, hazardous, or

dangerous working conditions. The act provides for liquidated damages, contract termination, and a 3-year debarment from Government contracts for violations.

Davis-Bacon Act, 40 U.S.C. 276a

Enacted in 1931, this statute provides for payment of prevailing minimum wages as determined by the Secretary of Labor, to laborers under construction contracts in excess of $2,000. Provisions similar to those under the Walsh-Healey Act are provided in the event of violations.

The Miller Act, 40 U.S.C. 270a-e

This act covers the same contracts as covered by the Davis-Bacon Act and requires the contractor to furnish performance and payments bonds for the protection of the Government and of all persons supplying labor and material in the prosecution of the work.

Service Contract Act of 1965, 41 U.S.C. 351

This statute covers all service contracts in excess of $2,500, whether advertised or negotiated, and requires the contractor to pay wages not less than those determined by th Secretary of Labor to prevail in the area for the type of work, to provide certain fringe benefits, such as hospital care, or the equivalent payment, and to see that the contrac is not performed under unsanitary or hazardous conditions. Violation of the act may result in debarment, contract termination and withholding of contract funds.

Other labor policies

Other policies applicable to Government procurement include the requirement under section 503 of the Rehabilitation Act of 1973 (Public Law 93-112) for contractors to em ploy qualified handicapped individuals. See FPR 1-12.1300 through 1-12.1310. Another labor policy of the Federal Government is enforced under the Wagner-O'Day Act, as amende (41 U.S.C. 46-48c) and FPR 1-5.800 through 1-5.805; all entities of the Government are generally required to purchase certain listed products and services from workshops for the blind and other severely handicapped.

SECTION VI--Government Assistance

In addition to the social policies just discussed, the Government affects the method in which contracts are awarded and the manner in which they are performed by the nature and degree of assistance it offers prospective contractors. Due to the developing complexity of Government procurements this assistance by the procuring agencies has increased greatly and has assumed two primary forms, financial assistance and use of Government property. The legal problems in this area are generated by the invitations for bids offering assistance and usually involve the responsiveness of bids requesting assistance in an unauthorized manner.

Financial assistance

Government financial assistance has been made available to contractors through guaranteed loans, advance payments, progress payments, and partial payments. Private contract financing is preferred wherever possible. DAR E-209; FPR 1-30.209(a). Government financing should be provided only if, and to the extent, it is reasonably required. DAR E-207; FPR 1-30.207.

The guaranteed loan is essentially a commercial loan to the contractor with the procurement agency's assurance that upon demand it will purchase from the financial institution a proportion of the loan. This type of financial assistance may be used only by those agencies engaged in procurement for the national defense. With the exception of certain customary progress payments, this method of financial assistance by the Government is preferred. The authority for this assistance is found in section 301(a) of the Defense Production Act of 1950, 50 U.S.C. App. 2091(a). Guarantees over $20,000,000 require congressional approval. 50 U.S.C. App. 2091(e)(1). Applicable regulations are in DAR E-300 through E-315. See also FPR 1-30.101 and 102.

Advance payments are made prior to production or delivery under a contract. This manner of financing is the least preferred and should be used sparingly. Authority for advance payments is contained in 10 U.S.C 41 U.S.C. 255. Advance payments require th give adequate security, such as a paramou property being produced, property acquired of the contract, or the balance of advance account in which they are deposited. Also

authority of P.L. 85-804, 72 Stat. 972 may provide for advance payments. When advance payments are authorized interest is usually charged on the money advanced. See DAR E-403; FPR 1-30.403.

Progress payments are payments made as work progresses under a contract, upon the basis of costs incurred, or percentage of completion accomplished, or of a particular stage of completion. DAR E-106. The use of customary and unusual progress payments is extensively covered by DAR, appendix E and FPR 1-30.500. Progress payments, while authorized by the same statutes as advance payments, are not considered to violate the general proscription against payment prior to delivery in that the Government when making these payments secures either a lien or title. 1 Comp. Gen. 143 (1921).

Partial payments are distinguished from progress payments in that the partial payment is made as the contractor makes actual partial delivery of supplies accepted by the Government. Partial payments normally are provided for by contract clause, upon request by the contractor, not to exceed 50 percent of the total contract price. While FPR considers partial payments a form of "financing," DAR does not.

Of course, non-governmental financing is available to Government contractors by virtue of the Assignment of Claims Act of 1940 (31 U.S.C. 203, 41 U.S.C. 15) which excepts from the general prohibition against assignments of claims and transfers of contracts those assignments, made in accordance with the requirements of the act, which are made to a single bank, trust company, or other financing institution.

The request for Government financial assistance is not to be treated as a handicap in making a contract award. However, if a contractor does not have adequate financial ability, he may be determined not responsible, and if he requests financial assistance in his bid which is not provided for in the invitation, or exceeds that permitted, his bid is nonresponsive. 47 Comp. Gen. 496 (1968).

Government property

The complexity of present day Government procurement has not only necessitated Government financial assistance,

but often requires industrial facilities or special tooling. As with financial assistance, it is the general policy that contractors provide the necessary capital assets to perform Government contracts. DAR 13-301. However, where the Government already possesses the required facilities or special tooling it is less reluctant to make those resources available. And it is DOD policy to make the greatest possible use of Government property in the possession of contractors in connection with the performance of Government contracts. DAR 13-401.

When Government-furnished property is made available to offerors, the Government attempts to eliminate any competitive advantage thereby conferred to a particular offeror by either making the property available on a rental basis or by adding an evaluation factor equal to rent to the bid. Inasmuch as the policy is for full utilization of Government property on rent-free-use basis, an evaluation factor normally is provided in the invitation which will be added to bids proposing use of Government-furnished property. DAR-13-501.

CHAPTER 6

CONTRACT PERFORMANCE

SECTION I--Introduction

Performance of Government contracts, like all contracts, should be carried out in strict accordance with the terms of the contract as written. In the absence of an ambiguity, prior negotiations, understandings or other forms of parol evidence are not available to alter the terms of performance as set out in the contract. Brawley v. United States, 96 U.S. 168 (1877). The terms of a contract and the manner of performance of course may later be altered by an agreement of the parties to the contract. However, it should be kept in mind that an agent of the Government cannot waive a vested contract right of the Government without adequate consideration. See chapter 2, supra. As a result, a party to a contract assumes the full risk of performing his obligation and undertakes the peril of compensating the other party by way of damages for any failure to perform. This strict rule of performance has been modified considerably in Government contracts through the inclusion of several contract clauses which allocate certain performance risks and allow the Government to unilaterally change, delay or terminate performance of a contract. However, prior to discussing these particular clauses, some attention must be given to preliminary matters which affect performance of any contract.

Government contracts are subject essentially to the same common law rules of interpretation applied to other contracts. Several of these basic rules of contract interpretation are as follows: The intention of the parties must be gathered from the whole contract; provisions of a contract should not be interpreted so as to render one or more meaningless, unless otherwise impossible, and the interpretation which gives reasonable meaning to the whole document is preferred; the dominant purpose and the interpretation adopted by the parties will be used to ascertain the meaning of the contract provisions; specific provisions prevail over general provisions when in conflict. Government contracts usually provide for resolution of a conflict between provisions by the inclusion of a clause titled "Order of Precedence." This clause provides that inconsistencies within the contract provisions shall be resolved by giving precedence in the following order: The schedule which contains information respecting price and delivery; solicitation instructions and conditions; general provisions which contain the standard contract terms; and other contract provisions such as the specifications describing the material to be procured.

One of the most important common law rules of interpretation, so far as Government contracts are concerned, is that involving an ambiguous provision which is susceptible of more than one interpretation. Simply stated, in such a case the ambiguity will be interpreted against the party responsible for creating it. Guyler v. United States, 161 Ct. Cl. 159 (1963). In Government contracts this is almost always the Government since the contract provisions are normally prepared by the Government. The interpretation adopted by the contractor in such cases need not be the only one but simply a reasonable interpretation. However, the ambiguity may be resolved against the contractor when he knew of the ambiguity and failed to seek clarification from the contracting officer prior to bidding (or award in the case of a negotiated contract). Beacon Construction Co. v. United States, 161 Ct. Cl. 1 (1963).

Equally important to the performance of Government contracts, or more aptly the risk thereof, are the specifications or standards which that performance must meet. Contract specifications dictate the very nature and degree of the performance to be undertaken by a contractor. When the specifications are accurate, complete and realistic the issue becomes merely one of performance or attributing the responsibility for a performance failure. As discussed in chapter 4, section V, there are essentially two types of contracts, the fixed-price and cost-type. In the latter the Government undertakes the responsibiliy for reimbursing the contractor for the cost of meeting the specifications while in the former the contractor assumes the risk or cost of meeting the specifications. For the purposes of this discussion and the chapter as a whole we will be concerned with those costs otherwise not allowable under the cost-type contract or the attempt by a contractor to receive an increase in the fixed-price contract. Since the Government to some degree drafts the specifications for all its contracts, the courts and boards of contract appeals have attached a certain legal significance or responsibility for that action. These specifications are drafted in the form of design or performance requirements or a combination of the two. As the complexity or detail of these specifications increases the legal difference between the two decreases. However, when a general performance specification is used, less responsibility for that specification attaches to the Government.

Where the Government has drafted a detailed set of specifications to be followed by the contractor in fulfilling his contractual obligation, the courts have held that the Govern-

ment impliedly warrants that if those specifications are followed the expected result will be obtained. United States v. Spearin, 248 U.S. 132 (1918). The Government may limit this warranty of specifications by notifying prospective contractors that they may be defective. Additionally, the contractor may have assumed the risk if it is shown that the contractor had knowledge of the facts to which the impossibility of performance is due. Impossibility of performance to excuse contract performance does not require actual or literal impossibility, only commercial impracticability which is when something can be done only at an excessive and unreasonable cost. Natus Corporation v. United States, 178 Ct. Cl. 1 (1967).

Defective specifications may entitle the contractor to additional compensation if the cost of performance is increased. Similarly a mutual mistake of fact may result in an adjustment to the contract price. In this situation there must be a mistaken concept by both parties as to a material fact which results in performance being more costly. The contractor to recover the extra cost of performance must show that the contract did not allocate to him the risk of such a mistake and that the Government received a benefit from the extra work for which it would have been willing to contract had the true facts been known.

All of the matters discussed above related to problems inherent in all contracts. Problems peculiar to Government contracts arise when the Government through the authority granted by a contract clause unilaterally alters either the time for, the method of, or the cost of performing the contract as awarded.

SECTION II--Changes

The contract clause entitled "Changes", together with the Default, Termination for Convenience, and the Disputes clauses to be discussed later, distinguishes Government contracts from other contracts by the control over performance vested in one of the contracting parties. Unlike other contracts where performance must conform to preagreed terms in the absence of a modification issued by both parties, the Changes clause in a Government contract allows the Government to alter the work to be performed without the consent of the contractor.

e General Provisions of Standard Forms 32 and 23A
the Changes clauses generally used. Those clauses

provide in essence that the contracting officer may by writt order make any change in the work within the general scope of the contract. Such changes may result also in an appropriate upward or downward equitable adjustment in the contract price, delivery schedule or time for performance. Additionally, the clauses provide that a dispute over the equitable adjustment shall be a question of fact under the Disputes clause and that nothing in the clause shall excuse the contractor from proceeding with the contract as changed. This power, unique to Government procurement, allows the contracting officer to alter performance without unnecessary interruption and to subsequently determine the appropriate contract price adjustment.

Change orders

The standard Changes clauses impose certain common requirements for issuing valid change orders. The first of these requirements is that the change be ordered by the contracting officer. This literal requirement has been relaxed in certain cases to cover changes directed by engineers and inspectors through the theory of ratification by the contracting officer or through an actual or implied delegation c authority. General Casualty Company v. United States, 130 Ct Cl. 520 (1955). Newell J. Olsen & Sons, Inc., GS BCA 1094, 64 BCA 4196 (1964). The clause also states the change must be made by written order. However, this requirement has been generally ignored by the courts. Armstrong v. United States, 98 Ct. Cl. 519 (1943). This is especially true since the development of the theory of constructive change orders. A constructive change is one where the contracting officer through his actions or directions has changed the work to be performed but failed to issue a change order.

One of the more important requirements is that the chang ordered must come within the general scope of the contract. Changes in work which go beyond the limits or scope of the contract are referred to as cardinal changes and constitute a breach of contract. Saddler v. United States, 152 Ct. Cl. 557 (1961). However, the cardinal change rule falls considerably short of establishing a clear guideline to be followed. In one instance the court held numerous changes to the foundation of a building to compensate for changed conditions discovered during construction constituted a cardinal change even though the resulting building was similar in size and function to that contracted for. Luria Brothers & Company

v. United States, 177 Ct. Cl. 676 (1966). In another instance the substitution of several construction materials due to a shortage of required materials during wartime was not a cardinal change. Aragona Construction Company v. United States, 165 Ct. Cl. 382 (1964). Generally a change is within the scope of the contract if the work ordered is essentially the same as that contemplated and bargained for at the time of contract formation. Aragona Construction Company v. United States, supra. The number of changes ordered does not, per se, dictate the work to be beyond the scope of the contract. Change orders have added and deleted work, accelerated performance, and altered specifications, drawings or inspection. However, deceleration of performance or extension of the time for performance is usually treated under the Suspension of Work or Government Delay of Work clauses.

The constructive change theory often is used to allow administrative settlement of cases involving defective or impossible specifications and for acceleration of performance situations where the contractor encountered excusable delays known to the Government but for which the Government refused to extend the performance time.

The Changes clause requires the contractor to assert his claim within 30 days of receipt of the notification of change unless the Government extends the period. However, in any case the claim must be asserted prior to final payment. This 30-day time period does not apply, however, to a constructive change in supply contracts and the claim must be asserted only within a reasonable time. Industrial Research Associates, Inc., DCAB WB-5, 67-1 BCA 6309 (1967). Under the clause in Standard Form 23A for construction contracts prior to 1968, the contractor was required to assert his claim for constructive changes within 30 days after formally advising the contracting officer that he considers the action a change. A new changes clause promulgated in 1968 required that written notice of claims be given within 20 days. However, some cases appear to have held that notice to the Government may consist of constructive rather than actual notice. See Davis Decorating Service, ASBCA No. 17342, 72-2 BCA 10,107 (1972); Russell Construction Company, ASBCA No. 379, 74-2 BCA 10,911 (1974). In any case, even in constructive changes, the contractor should perform the work under protest and not as a mere volunteer. WRB Corporation v. United States, 183 Ct. Cl. 409 (1968).

Equitable adjustments

The equitable adjustment provided for by the Changes clauses is for the purpose of making the contractor whole for any modification by the Government. The adjustment may be made in terms of contract price, delivery schedules, or both, and may be a decrease as well as an increase where the change by the Government reduces the cost of performance. E.W. Bliss Company, ASBCA 9489, 68-1 BCA 6906 (1968). The equitable adjustment to the contract price for extra work caused by a change includes a profit on such work as part of the cost of the work. United States v. Callahan Walker Construction Co., 317 U.S. 56 (1942). The current Changes clauses provide the equitable adjustment shall cover increases in cost to both the changed and unchanged work resulting from the change order. However, the costs for delay prior to a change order and not the result of the change are not compensable under the equitable adjustment provisions of the clause. Spencer Explosive, Inc., ASBCA 4800, 60-2 BCA II 2795 (1960).

One of the more troublesome areas under the Changes clause had been the measure of the equitable adjustment. The standard used is the reasonable cost to the contractor not a hypothetical third party. The actual cost is presumed reasonable unless shown otherwise. Bruce Construction Corporation v. United States, 163 Ct. Cl. 97 (1963). In determining the costs, which often are estimated since the clause provides for adjustment at time of change not after performance, the boards of contract appeals and the courts have used, in addition to other methods, a "jury verdict" method of weighing the separate cost items in preference to a "total cost" approach whereby the cost is reviewed as a whole to determine reasonableness. Western Contracting Corporation v. United States, 144 Ct. Cl. 318 (1959). However, at times the "total cost" method has been used especially where precise costs cannot be determined or isolated. Hedin Construction Company v. United States, 171 Ct. Cl. 70 (1965).

SECTION III--Default or Delay in Performance

The Default clauses vary somewhat according to type of contract. See, for example, DAR 7-103.11 (clause for fixed-price supply contracts), DAR 7-203.10 (cost reimbursement-type supply contracts), and DAR 7-602.5 (construction and architect-engineer contracts). The Default clauses, in addition to prescribing the procedure for default terminations, damages for default, and the result of improper default terminations, set forth certain conditions under which delay in performance will be excused. Accordingly, before discussing default proceedings, we shall consider those performance failures or delays which are excusable.

Delays

Delays in contract performance are caused by two sources, the parties to the contract and by outside forces. Paragraph (c) of the Default clause for fixed-price supply contracts provides that the contractor shall not be liable for any excess costs if the failure to perform the contract arises out of a cause beyond the control and without the fault or negligence of the contractor. If the failure to perform is caused by the default of a subcontractor then the causes of default must be beyond the control and without the fault or negligence of the subcontractor as well. The clause for contruction contracts is similar except the failure to perform the contract must arise from unforeseeable causes. The addition of the word "unforeseeable" may lead to different results under the same facts. 39 Comp. Gen. 478 (1959). However, some commentators believe that if a cause is foreseeable then it is within the contractor's control to provide for and not excusable under either clause. The test of foreseeability is knowledge or reason to know prior to bidding. Harriss & Covington Hosiery Mills, Inc., ASBCA 260.

The clauses also list several examples of causes which will be considered excusable delays. While the court decisions have wavered, the boards of contract appeals have also sometimes found other delays excusable, if beyond the control and without the fault or negligence of the contractor and if the particular risk was not assumed by the contractor. See Utah-Manhattan-Sundt, Joint Venture, ASBCA 8991, 63 BCA 3839. Golden City Hosiery Mills, Incorporated, ASBCA 244. Finally, the contractor's responsibility for subcontractor delays has been limited to those subcontractors over which the contractor exercises control and for which it is contractually responsible. The prime need not show lack of fault or negligence on the part of lower tier subcontractors in order to establish excusability. Schweigert, Inc. v. United States, 181 Ct. Cl. 1184 (1967). After Schweigert, the clause was revised to include subcontractors at any tier. See American Electronic Laboratories Inc., 74-1 BCA 10499.

Under the excusable delay provisions of the Default clauses, the contractor has the burden of showing that performance was actually delayed and the extent of that delay. Where the contractor fails to carry this burden or where the delay is attributed to excusable and unexcusable causes which cannot be apportioned, a time extension will not be granted. Murray J. Shiff Construction Co., ASBCA 9029, 64 BCA 4478 (1964).

The provisions of the Default clauses provide only for performance time extensions and do not provide for an adjustment in the contract price to compensate the contractor for any increase in the cost of performance as a result of the delay. Normally, Government contracts do not contain any other clause providing for such an adjustment if the delay is caused by other than the Government and in that case the contractor must bear the cost. Fritz-Rumer-Cooke Co. v. United States, 279 F.2d 200 (1960). There is, however, an implied obligation in every contract that the other party to the contract will not hinder or prevent the performance of the other party. Murphy v. North American Company, 24 F. Supp 471 (1938). Several acts by the Government have been held to breach this implied duty such as issuing faulty specifications, delay in furnishing Government property or making the site available, delays in inspection, approval or notice to proceed with performance. See e.g., Laburnum Construction Co. v. United States, 163 Ct. Cl. 339, 325 F.2d 451 (1963), involving faulty specifications. However, when the Government acts as the sovereign rather than as the contracting party it does not breach the contract regardless of delay. See chapter 1, section III. To recover for Government caused delay, the contractor must show three things: first, that the Government expressly or impliedly promised to do or not to do something; second, that the Government unexcusably failed to keep that promise; and third, that the Government's breach of promise was the proximate cause of the contractor's increased costs. Commerce International Company v. United States, 167 Ct. Cl. 529, 338 F.2d 81 (1964).

Often the Government act, which otherwise would constitute a breach of contract, is held to constitute a change under the Changes clause or is determined to be cognizable under the Differing Site Conditions clause of the contract. Under the latter clause the contractor receives an equitable adjustment similar to that under the Changes clause, if the site condition materially differs from what the Government warrants or what is usual for the area in question. In addition to these clauses, construction contracts contain a mandatory clause, entitled "Suspension of Work", which allows the Government to unilaterally suspend work for its convenience and to adjust the contract price to reflect the cost for any work unreasonably delayed. The adjustment in the contract price does not cover a profit on the increased cost. In recent years, an optional Stop Work clause for supply contracts has been developed which is similar to the Suspension of Work clause. The adjustment under the Stop Work clause

includes profit of the cost incurred. These clauses were developed to give the Government increased control over the performance of a contract without incurring a claim for breach of contract. Both include a time period within which the contractor must assert his claim for delay and this time period has been strictly enforced. Structural Restoration Company, ASBCA 8747, 8756, 65-2 BCA 4975 (1965). The Stop Work clause also restricts the period for which the Government may unilaterally delay performance. The boards of contract appeals have increased the coverage of the Stop Work clause by invoking the doctrine of constructive suspension of work where the Government should have issued an order but failed to do so. Patti Construction Co., Massman Construction Co., & MacDonald Construction Co., Joint Venturers, ASBCA 8423, 64 BCA 4225 (1964). The Suspension of Work clause in construction contracts expressly covers constructive suspensions of work. The clauses now cover apparently all acts of the Government, not covered by other clauses, which would constitute breach of contract in the absence of such a clause. 36 Comp. Gen. 302 (1956). These clauses cover only delay for an unreasonable period of time and the boards have apportioned delay into unreasonable and reasonable periods. Barnet Brezner, ASBCA 6207, 61-1 BCA 2895 (1961).

Default

The termination for Default clauses contained in the General Provisions Standard Forms 32 and 23A set forth the rights of the Government in case the contractor fails to perform or make progress under the contract. In addition to defining excusable delay, previously considered, those clauses prescribe the procedures for invoking default termination, the contractor's liability, and the result when a termination for default is improperly made. Any default termination must be scrutinized on the basis of the particular clause involved.

The right to terminate a contract for default is discretionary with the procurement activity and the appropriate contract officials should exercise judgment in reaching a decision to terminate. Schlesinger v. United States, 182 Ct. Cl. 571, 390 F.2d 702 (1968). The Default clauses provide for two bases for terminations. One is for failure to perform within the time required, and the second is for failure to make progress with the work or to perform any other contract requirements within the period provided by a "cure notice" from the Government. In the first type of termination

the Government may show that it reasonably exercised its right to terminate simply through evidence that the time for performance has passed. Nuclear Research Associates, Inc., 70-1 BCA 8237 (1970). But where a project is substantially complete by the time required or supplies in substantial conformance with the specifications are delivered by the due date, default termination may not be effected unless time is of the essence. Radiation Technology, Inc. v. United States, 177 Ct. Cl. 227 (1966). In a termination for failure to make progress the burden of proof becomes more difficult and the Government must show the contractor would not have timely performed had the contract not been terminated. Williamsburg Drapery Company, ASBCA 5484, 61-2 BCA 3111 (1968). The Government may lose the right to terminate for default through waiver if it allows the contractor to continue to perform and incur expense for an unreasonable time. DeVito v. United States, 188 Ct. Cl. 979, 413 F.2d 1147 (1969). Once a delivery schedule is waived the Government must reinstate a schedule, either by agreement or a reasonable one unilaterally established, for time to be of the essence so as to invoke later default action. Luman, Inc., ASBCA 6431, 61-2 BCA 3210 (1961). Additionally, where the work is divisible the Government may terminate for failure to make progress only that part of the work on which the contractor fails to make progress, not the whole contract. Murphy v. United States, 164 Ct. Cl. 332 (1964).

When the Government terminates a contract for default, the clause provides the contractor shall be liable for excess costs of reprocurement, and liquidated damages accrued or, in the absence of liquidated damages, the actual damages suffered by the Government. The last provision of the standard default articles provide that the rights and remedies of the Government under the clause are in addition to any other rights and remedies provided by law or contract clause. As such the Government may recover actual damages even where it has lost its right to reprocurement under the Default clause. Rumley v. United States, 152 Ct. Cl. 166 (1961). To recover excess costs of reprocurement under the Default clause, the cost of the reprocured material must be reasonable, the reprocured items must be substantially the same as required under the original contract, and the Government must have acted in a reasonable manner so as to mitigate those costs. Office Equipment Co., ASBCA 5040, 59-2 BCA 2302 (1959).

Termination for convenience

The Termination for Convenience clause gives the Government the right to cancel a contract when to do so is in the best interest of the Government, notwithstanding the contractor's ability and readiness to perform. In addition the Default clauses just discussed provide that an erroneous default termination shall be considered a termination for convenience when such a clause is included in the contract. Currently, the major procurement regulations make the inclusion of a termination for convenience mandatory. Where the clause is mandatory by regulation the courts have held the clause to be included by law in the contract even though not in fact present. G. L. Christian and Associates v. United States, 160 Ct. Cl. 1 (1963). As a result most Government contracts may be presumed to include a Termination for Convenience clause. The real effect of this clause is to establish the measure of compensation the contractor may recover for the Government's termination of the contract. In the absence of this contract right the unilateral repudiation of a contract would be a breach of contract. In a breach of contract the aggrieved party may recover his expected or anticipated profits as damages. However, under the clause the contractor recovers only his costs and the profit earned on work actually accomplished and the latter only if he is in a profit position at time of termination. The contractor's recovery has been limited to this measure even where the Government failed to invoke the termination article. John Reiner & Co. v United States, 163 Ct. Cl. 381 (1963). While there must have been a justifiable reason for invoking the Termination for Convenience clause, College Point Boat Corporation v. United States, 267 U.S. 12 (1924), the courts traditionally have been reluctant to interfere with the broad discretion granted to the contracting officer by this clause. See Librach and Cutler v. United States, 147 Ct. Cl. 605 (1959), and Colonial Metals Company v. United States, 494 F.2d 1355 (Ct. Cl. 1974). At the same time, several decisions in recent years indicate that a trend may be developing towards closer judicial scrutiny of decisions to terminate for convenience. See National Factors, Inc. v. United States, 492 F.2d 1383 (Ct. Cl. 1974) (termination for convenience is valid only in absence of bad faith or "clear abuse of discretion") and Art Metal-U.S.A., Inc. v. Solomon, 473 F. Supp. 1 (D.D.C. 1978).

The cumulative effect of the Convenience clause and the contract clauses for Default, Changes and Suspension of Work is to give the Government an extraordinary control over the performance of its contracts and to establish by contract the measure of reimbursement to be given to contractors when the Government exercises these rights. This power becomes

even more remarkable when coupled with the Disputes clause of the contract which establishes the contracting officer as the initial arbiter of any disputes arising under the contract and makes his decision final on questions of fact subject to an appeal to the board of contract appeals. More importantly it requires the contractor to perform in accordance with the contracting officer's decision pending final decision of a dispute.

SECTION IV--Acceptance and Payment

In the absence of a breach of contract or termination by the Government the contractor at some point will tender performance for acceptance by the Government. After inspection and acceptance the Government's duty to make payment under the contract arises. The rights of the Government and the contractor are primarily contained in the standard Inspection and Payment clauses of the contracts.

Inspection and acceptance

The Default clause, previously discussed in this chapter, sets forth the Government's remedy for a contractor's failure to perform timely. The standard Inspection clauses, contained in Standard Forms 23-A and 32, for supply and construction contracts, respectively, provide the Government a remedy for other defects in a contractor's performance.

The Inspection clauses provide two distinct types of inspection, often referred to as in-process and acceptance inspections. The in-process inspection is conducted during contract performance and allows the contracting officer to direct correction prior to delivery; the inspection conducted at this stage does not usually prevent subsequent rejection for defects discovered prior to formal acceptance. However, under certain circumstances where the inspector's acts imply waiver of a defect the Government has been estopped from later rejecting the performance. Daniel Joseph Company v. United States, 113 Ct. Cl. 3 (1949), Inet Power, NASA BCA 566-23, 68-1 BCA 7020 (1968).

The Government has the right to conduct inspections but this does not mean the right will always be exercised. In many procurements, the contractor is required to establish a quality control program and the Government will limit its inspection to a review of that program. When the Government does choose to inspect it has broad latitude in selecting the type of inspection and the number to be conducted. Crown Coat Front Company v. United States, 154 Ct. Cl. 613 (1961); Red Circle Corporation v. United States, 185 Ct. Cl. 1 (1968). However, the inspection may not impose a higher standard of

quality than that required by the specifications. Gibbs Shipyard, Inc., ASBCA 9809, 67-2 BCA 6499 (1967). Also w conducting an inspection the Government may delay the performance of a contract for a reasonable time for that purpose. However, in the absence of a Suspension of Work clause, unreasonable delay constitutes a breach of contract by the Government. Gardner Displays Company v. United States, 171 Ct. Cl. 497 (1965).

If the Government chooses to inspect and discovers defects, two courses of action are available. The Government may reject or refuse to accept the contractor's tendered performance or the contracting officer may direct correction of the defects. The Government is entitled to strict compliance with the specifications and the alternate relief through correction of defects or price reduction for defects has been viewed as discretionary and does not affect the determination to reject performance. Cart Manufacturing Company, ASBCA 5249, 65-2 BCA 24397 (1965). In construction contracts the strict compliance with specifications rule has been diminished somewhat by the doctrine of substantial performance. Continental Illinois National Bank & Trust Company v. United States, 122 Ct. Cl. 804 (1952). The courts have used this doctrine to deny rejection for minor defects where the work has been substantially completed in good faith and the cost of correcting the defects would be greatly disproportionate to the damage to the Government in accepting the work. This doctrine as such is not applicable to supply contracts. In addition to substantial performance, the Government's right of rejection has been limited to particular items where the inspection conducted was not sufficient to be a reasonable basis to reject the whole lot. J. A. Jones Construction Company, ASBCA 5798, 61-2 BCA 3256 (1961). In any case, the contractor must be notified of rejection and the reasons for the rejection within a reasonable time. In the absence of notice, implied acceptance may be found by the court or the rejection held improper when made on an erroneous basis before delivery and the contractor might have corrected the defect. Cudahy Packing Company v. United States, 109 Ct. Cl. 883 (1948). However, rejection for an improper reason after time for delivery will not be set aside if a valid basis for rejection did exist. Chula Vista Electric Company, ASBCA 9830, 65-2 BCA 23191 (1965).

The alternative to rejection of defective performance permits the Government to require the contractor to replace or correct the defective material and if that is not done promptly the Government may do so by contract or otherwise

at the cost of the contractor. This avenue allows the Government through supervision to obtain timely performance in accordance with the specifications. If the time for delivery already has passed the Government at its discretion also may accept defective performance with a corresponding reduction in contract price. Cherry Meat Packers, Inc., ASBCA 8974, 63 BCA 19506 (1963). This does not constitute a waiver of those defects for any subsequent performance.

In the absence of a contract provision to the contrary, the Government must accept the performance when tendered by the contractor or reject it as nonconforming. If the Government fails to give notice of rejection within a reasonable time the court may construe the Government's acts as a waiver of defects and acceptance of the otherwise nonconforming performance. J. R. Simplot Company, ASBCA 3952, 59-1 BCA 2112 (1959); Cudahy Packing Company v. United States, 109 Ct. Cl. 833 (1948). Payment creates the presumption that the transaction is closed. Dubois Construction Company v. United States, 120 Ct. Cl. 139 (1951). However, payment must be authorized by the same person who is authorized to accept or reject the performance.

Acceptance under the standard inspection articles in supply and construction contracts, Standard Forms 23-A and 32, is conclusive on the Government except for latent defects, fraud, or such gross mistakes as amount to fraud. The Government's rights under the Inspection clause are largely extinguished. However, the Government sometimes includes a Guaranty or Warranty clause in its contracts which has the effect of postponing the finality of acceptance. Where remedies remain available after acceptance under both the Inspection clause and the Guaranty clause the Government may proceed under either clause. Federal Pacific Electric Company, IBCA 334, 64 BCA 4494 (1964). The Government has the burden of proving the existence of latent defects. Latent defects are those defects which exist at the time of acceptance but which are not discoverable by a reasonable inspection. Hercules Engineering & Manufacturing Company, ASBCA 21979, 59-2 BCA 2426 (1959). The Guaranty or Warranty clause used by the Government should not be confused with the commercial type warranties. The former applies only to latent defects and is not a promise that something will perform satisfactorily for a stated period of time.

Payment and discharge

After acceptance the Government incurs the obligation to make payment. This is normally the primary obligation of the Government in contracts and is set out in the Payments clause of the contract which contains certain requirements such as submission of proper invoices. While the Government normally will, and should, make prompt payment to take advantage of any prompt payment discount, the contractor may not recover interest for delay in payment absent a statute or contractual provision specifically authorizing the payment of interest. Ramsey v. United States, 121 Ct. Cl. 426, 101 F. Supp. 353 (1951). See also 28 U.S.C. 2516(a). In addition, the Government has the common law right of setoff by which a contract payment may be applied to discharge an outstanding debt due by the contractor to the Government. United States v. Munsey Trust Co., 332 U.S. 234 (1947). Public Law 89-505, 28 U.S.C. 2415, passed by Congress in 1966, set forth the first time a statute of limitations on claims by the United States. However, that law specifically excluded the application of the provisions to the Government's right of setoff. The Comptroller General is specifically required to setoff debts of contractors against judgments against the United States. 31 U.S.C. 227. The Government's right of setoff is lost so far as concerns claims arising independently of the contract when an assignment has been made by the contractor pursuant to the Assignment of Claims Act of 1940, 41 U.S.C. 15, 31 id. 203, 65 Stat. 41, and the valid assignment contains no set-off provision.

One of the more vexatious problems in making payment arises where the Government is a mere stakeholder of the contract funds and is faced with various claimants. Because the courts are not consistent on these matters and dual payment may result, the Government has often refused to pay except pursuant to an authoritative court decision or an agreement of the parties. See Speidel, "'Stakeholder' Payments under Federal Construction Contracts: Payment Bond Surety v. Assignee," 47 Va. L. Rev. 640 (1961).

There is no general rule in Government contracts as to what constitutes a discharge of the party's obligation under the contract. However, acceptance of final payment by the contractor without exception normally will constitute a discharge. In certain contracts, such as cost reimbursement, the Government may require the contractor to execute a written release of any other claims under the contract. However, in the absence of such a release the dealings of the

parties may also show accord and satisfaction. An accord is a bilateral agreement requiring additional performance (payment) in settlement of a claim. Satisfaction occurs when that performance is tendered. It should be remembered that both the Government and the contractor may reserve certain contested claims for resolution at a later date.

SECTION V--Disputes

Prior to 1978 the procedure for settling disputes under executive agencies' contracts was not specifically prescribed by statute but rather was based on a contract clause. Essentially, the parties to the contract agreed that any dispute concerning a question of fact arising under the contract was to be decided by the contracting officer, who would furnish his written decision to the contractor. The contractor then had 30 days to make a written appeal to the head of the agency (or, more commonly, to a board of contract appeals acting as his duly authorized representative).

The Contract Disputes Act of 1978, 41 U.S.C. 601-613, brought about a number of changes in the disputes procedure applicable to executive agencies' contracts. Some of the more important changes are briefly described below.

The all disputes provision

Prior to the act the disputes procedure covered only disputes arising under the contract; claims based on breach of contract were for resolution by the courts. The distinction between a claim arising under a contract and a breach of contract claim was not always easy to make.

The act provides (41 U.S.C. 605(a)) that all claims by a contractor against the Government "relating to a contract" shall be submitted to the contracting officer for a decision. Thus, both disputes under the contract and breach-type claims can be handled under the same procedure.

In connection with the act's provision that all claims relating to a contract shall be submitted to the contracting officer for a decision, GAO has held that executive agencies should continue to refer demands for payment arising under informal commitments to GAO for settlement and that the act does not conflict with GAO's statutory authority to pass upon the propriety of expenditures of public funds. Contract Disputes Act of 1978, B-195272, January 29, 1980, 80-1 CPD 79.

Direct access to court

Prior to the act, contractors were required to appeal a contracting officer's decision to the cognizant board of contract appeals. The act allows contractors direct access to court as an alternative to appealing to the boards of contract appeals. See 41 U.S.C. 605(b), 606.

Government's right to seek judicial review

Under the disputes procedure in effect prior to the act the Supreme Court held in S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972) that, absent fraud, neither GAO nor the Justice Department could interfere with a board of contract appeals decision in favor of a contractor. The right of a contracting agency to appeal an adverse board decision was unsettled.

The act allows agency heads to appeal board decisions provided they secure the Attorney General's approval. 41 U.S.C. 607(g)(1)(B). On appeal a board's decision is not final or conclusive on any question of law, but on questions of fact is final and conclusive unless fradulen or arbitrary, or capricious, or so grossly erroneous as t necessarily imply bad faith, or if not supported by substantial evidence. 41 U.S.C. 609(b).

Other noteworthy provisions of the act include the provision establishing the liability of contractors for fraudulent claims (41 U.S.C. 604), the granting of the boards of contract appeals of certain subpena, discovery and deposition powers (41 U.S.C. 610), the allowance of interest on contractor claims payable from the date the contracting officer receives the claim (41 U.S.C. 611), and a provision for payment of board judgments from the same permanent appropriation available for judicial judgments (41 U.S.C. 612(c)).

This manual is intended only to give certain broad guidelines in this area, and any proposition is subject to modification by statute, contractual agreement and by the dealings of the parties when contracting. Greater detail may be found in the following publications which were of great assistance in preparing the manual: Federa Procurement Law, Nash and Cibinic (1969); Government Contracts Handbook, Cuneo (1962); Navy Contract Law, Depart- . of the Navy (1959); United States Government Contrac Subcontracts, Jack Paul; Government Contract Changes, ı (1975); Government Contract Bidding, Shnitzer (1976)

A P P E N D I X

CITATION TABLES

BOARD OF CONTRACT APPEALS CASES

CODE OF FEDERAL REGULATIONS

CONSTITUTION OF THE UNITED STATES

CORPUS JURIS SECUNDUM

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